Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANNY JOE MCGEE, III,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether warrantless arrest of Petitioner by routine street police officer pursuant to what initially began as an investigation of an anonymous information alleging crack cocaine sales was unreasonable under the Fourth Amendment to the United States Constitution.

2. Whether warrantless strip visual or digital anal cavity search of Petitioner following warrantless arrest by routine street police officer pursuant to what initially began as an investigation of an anonymous information alleging crack cocaine sales was unreasonable under the Fourth Amendment to the United States Constitution absent exigent circumstances where the search was not conducted at a border crossing, penal institution, hospital, police station house or jail facility.

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PETITION FOR A WRIT OF CERTIORARI

CITATIONS TO OPINIONS ENTERED BELOW

The opinion of the Court of Criminal Appeals of Texas (Appendix A-1) is reported at *McGee v. State of Texas, 105 S.W. 3d 609 (Tex.Crim.App 2003).* The opinion of the Court of Appeals of Texas (Appendix A-23) is reported at *McGee v. State of Texas, 23 S.W.3d 156 (Tex.App.-Houston[14th Dist.] 2000).* There was no opinion of the 232nd District Court of Harris County, Texas; however, the court orally (Appendix A-52) and by written order (Appendix A-51) denied relief requested by Petitioner at the trial court phase of the proceeding.

STATEMENT OF BASIS OF JURISDICTION

The Court of Criminal Appeals of Texas' judgment was entered on April 23, 2003. A timely filed motion for rehearing was denied on June 11, 2003(Appendix A-50). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). Under Rule 13.3 of this Court, this petition is timely filed within 90 days of after entry of denial of Petitioner's motion for rehearing in the Court below.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

STATEMENT

A. Facts Material To Consideration of Questions Presented

On December 20, 1997, Petitioner and two juvenile individuals, Damion Williams and Camilo Vargas were in or around a public area of Fleming and Coolwood streets in Houston, Texas walking down the sidewalk. [R.R., Vol. 1, page 29, lines 1-5, and 20-25; page 30, lines 1-5]. Houston Police Officer Rowan claimed to have received information from a concerned citizen that Petitioner, whose name was "Joe" and two other individuals were selling crack cocaine in the area around Fleming and Coolwood streets and that Petitioner stored the crack cocaine in his "ass". [R.R., Vol. 2, page 67, lines 7-14; page 53, lines 13-17; page 67, lines 10-14; page 66, lines 5-10]. The concerned citizen described Petitioner by name and clothing. [R.R., Vol. 2, page 54, lines 13-64]. There was no testimony that the concerned citizen personally observed or witnessed the criminal activities described to the officer. Neither are there any facts in the record disclosing the identity of the concerned citizen, nor the source, time, place, or under what circumstances the concerned citizen obtained the information. The record is also silent on how and in what manner the information was relayed to the officer. The officer testified that he had never used information from this unnamed concerned citizen before. [R.R., Vol. 2, page 74, lines 7-10]. Based on the information from the concerned citizen, Officer Rowan and his partner decided to check out the tip and proceeded to the area of Fleming and Coolwood where Petitioner and his two juvenile companions were allegedly selling crack cocaine. The officers did not perform any sort of investigatory surveillance of Petitioner in order to attempt to observe Petitioner and his two companions engage in the felony criminal acts of selling crack cocaine and storing crack cocaine in his anus. The officers did observe Petitioner with the described clothing and his companions in the area that the concerned citizen said they would be; but did not

observe Petitioner and the two juveniles engaged in selling crack cocaine as the concerned citizen had reported nor did they observe Petitioner possessing crack in his anus as the concerned citizen had reported nor did the officers observe Petitioner or either of the individuals commit any other felony crime or any crime in the officers presence. [R.R., Vol. 2, page 78, lines 2-9; Vol. 2, page 55, lines 20-24]. But Officer Rowan stated he observed a cloud of blue smoke emanating from the individuals and his experience led him to believe that the smoke was marihuana smoke. [R.R., Vol. 2, page 56, lines 4-8]. Officer Rowan never observed Petitioner or his companions blow smoke out of their mouths or nostrils, smoke or pass marihuana cigarettes between them, exercise care, custody, control or management over marihuana, discard any marihuana or make any furtive moves or gestures. Officer Rowan stated that based on the information from the concerned citizen and the seeing of the cloud of blue smoke he decided that he would initiate an investigation. The officers approached Petitioner and the two juveniles and called them to the patrol car. Petitioner and his companions complied with the officers request. Only after officer Rowan had initiated the investigative detention of Petitioner and his companions by calling them to the patrol car and their compliance therewith, did Officer Rowan state that he noticed the smell of the odor of marihuana. Officer Rowan then initiated a more definite investigative seizure of Petitioner and the two juveniles and required all of them to put their hands on the patrol car. The Officers confirmed their identities, confirmed that Petitioner's name was "Joe" just as the concerned citizen had reported and discovered that Petitioner's companions were juveniles. At the street scene, Officer Rowan handcuffed Petitioner, searched him, pulled his pants and underwear away from his body and looked at Petitioner's naked body in the front and the back. The officers did not find any weapons, marihuana or drugs on the person of Petitioner or the two juveniles. Officer Rowan stated that he did find a small amount of marihuana in the area. [R.R., Vol. 2, page 56, lines 21-23]. Officer Rowan never stated exactly where the marihuana was found with respect to the proximity to either Petitioner or the two juveniles. Officer Rowan

never determined or attempted to determine who possessed or had a right to the care, custody, control or management of the marihuana; but more importantly, he specifically never attributed possession or the right to the care, custody, control or management of the marihuana to Petitioner. [R.R., Vol. 2, page 79, lines 15-18, page 80, lines 2-7.]

Based on the above facts and circumstances, Officer Rowan then put Petitioner and the two juveniles in his patrol car and transported them to Fire Station Number 44 located at 675 Maxey Road which was which was several minutes away. [R.R., Vol. 1, page 32, lines 1-24; Vol. 2, page 58, lines 2-12; page 80, lines 8-10]. While in the patrol car, Petitioner tried to inquire as to where he was going, but was repeatedly told to shut up. [R.R., Vol. 1, page 33, lines 11-16; Vol. 2, page 43, lines 2-9.] Officer Rowan stated that up to this point that no one was under arrest and the reason for this action was that he was still conducting a perpetual investigation of street sales of cocaine and possession of cocaine. [R.R., Vol. 2, page 79, lines 23-25; page 80, lines 1-25; page 81, lines 1-10]. Ultimately, the officer admits that he was trying to locate crack cocaine.[R.R., Vol. 2, page 84, lines 1-7.] Officer Rowan also admits that Petitioner was never free to leave, was never out of his sight and that there were no exigent circumstances. [R.R., Vol. 2, page 85, lines 11-16, lines 24-25; page 86, lines 1-4, lines 8-19; page 86, lines 22-25; page 87, lines 1-2; page 87, lines 13-25 and page 88, line 1.] Upon arriving at the fire station Petitioner and his companions were handcuffed to a door at the fire station. [R.R., Vol. 1, page 34, lines 11-19, page 35, lines 12-14; Vol. 1, page 17, lines 8-9.] Officer Rowan then obtained from fire station personnel some rubber gloves which were stored in a box in a cabinet at the fire station. [R.R., Vol. 1, page 34, lines 11-19, page 35, lines 12-14; Vol. 2, page 58, lines 13-25.] The officers did not sterilize the gloves. [R.R., Vol. 2, page 50, lines 20-25, page 51, lines 1-3.] All three individuals including Petitioner remained handcuffed while at the fire station. Officer Rowan specifically chose Petitioner to search first. [R.R., Vol. 1, page 33, lines 24-25, page 34, lines 1-6; Vol. 1, page 17, lines 16-25.]

Officer Rowan maintained that Petitioner was not under arrest but rather that Officer Rowan was conducting a perpetual investigation of street sales of crack cocaine and possession of crack cocaine. [R.R., Vol. 2, page 42, lines 19-23.] With hands cuffed in the back of him, Petitioner was taken by officer Rowan to a table at the fire station where the fire trucks are parked and was pushed forward over the table. [R.R., Vol. 1, page 35, lines 21-35, page 36, lines 1-2 and lines 11-12.] Petitioner wanted to have nothing to do with the search.[R.R., Vol. 1, page 37, lines 14-18; Vol. 2, page 59, lines 20-25, page 60, lines 1-3.] Petitioner could not drop his pants because he was still handcuffed. [R.R., Vol. 2, page 46, lines 21-25, and page 47, lines 1-8.] Officer Rowan stated that he wanted to make the search as painless as possible. [R.R., Vol. 2, page 60, lines 4-20.] Officer Rowan pulled Petitioner's pants and underwear down, kicked his legs apart and with rubber gloves on his hands, Officer Rowan proceeded to perform a visual lower body strip search of Petitioner. [R.R., Reporter's Record, Vol. 2, page 41, lines 19-23.] Officer Rowan apparently did not initially see any contraband and thereupon spread Petitioner's butt cheeks to perform a visual anal cavity search to view inside of Petitioner's anus. Still being unable to see any contraband, Officer Rowan, using his index finger probed inside of Petitioner's anal cavity to perform a digital anal cavity search whereupon he discovered crack cocaine inside of Petitioner's anus.[R.R., Vol. 1, page 35, lines 21-35, page 36, lines 1-2 and lines 11-12; Vol. 2, page 43, lines 17-25 and page 44, lines 1-3.] The crack cocaine was recovered from inside of Petitioner's anus. Petitioner was sure that none of the crack cocaine was protruding out of his anus. [R.R., Vol. 2, page 48, lines 21-25, page 49, lines 1-8 and page 48, lines 13-19.] The officer admits that Petitioner's bare naked anus was exposed to him. [R.R., Vol. 2, page 70, lines 7-16. The officer disputes that he ever physically probed Petitioner's anus. However, when asked to describe how the search proceeded Officer Rowan stated:

> Q. Can you tell us, describe for us if you would how the search proceeded.
> A. I would ask the suspect to drop his pants

> and I--initially the suspect had made it quite obvious that he was very I should say worried about the proceedings. Due to his language, his resistance to what we were doing I had the suspect drop his pants bend over. He was handcuffed and I told the suspect to spread his buttock cheeks.

[R.R. Vol.2, page 59, lines 20-25, page 60, lines 1-3.] Officer Rowan stated that upon spreading Petitioner's butt cheeks, the crack cocaine was in "plain view".

Damion Williams testified that he told the officers repeatedly that he did not have any drugs on him. [R.R., Vol. 1, page 18, lines 14-25 and page 19, lines 1-3.] The officer had the gloves on and just told Damion to unbuckle his pants, bend over and grab his ankles whereupon using his index finger, the officer proceeded to probe inside of Damion's anal cavity in the same manner as had been done to Petitioner.[R.R., Vol. 1, page 19, lines 6-8 and page 19, lines 25, page 20, lines 1-25 and page 21, lines 1-12.] After the officers did not find any crack cocaine in Damion's anus, they told him to pull up his pants and sit down. Officer Rowan admitted that he searched the two juveniles in the same manner as Petitioner, but did not find any crack cocaine and ultimately released the juveniles.[R.R., Vol. 2, page 61, lines 20-25; Vol. 2, page 62, lines 8-16.] Damion Williams testified that the officers boasted about what they had done. [R.R., Vol. 1, page 21, lines 17-25, page 22, lines 1-3; Vol. 1, page 22, lines 18-22 and page 24, lines 1-4.]

Officer Rowan testified that he and his partner returned Damion Williams to the street location where he had taken custody of all three individuals and released Damion; then drove Camilo Vargas home and released him to his parents. At the time of the searches, Officer Rowan admitted that he knew that Damion Williams and Camilo Vargas were juveniles. Officer Rowan stated that he had made no decision to arrest anyone until after he

discovered the crack cocaine in Petitioner's anus. Officer Rowan stated that there was no emergency or exigent circumstances. Rowan admitted that he had no formal training at the Houston Police Academy on conducting the type of searches that he performed on Petitioner and the juveniles. Rowan stated that he had on-the-job training and that the type of searches performed on Petitioner and his companions were routinely conducted by Houston policeman out in the field.

At the suppression hearing, Damion Williams testified that he went home immediately after the search. Upon returning home, Damion Williams informed his mother Harriett Williams that a police officer had searched him and had went up his rectum. Harriett Williams testified that she immediately went into the bathroom after Damion had left out and noticed that Damion had thrown his underwear in the trash. Upon her inspection of the underwear, she discovered "stool" in Damion's underwear. [R.R., Vol. 2, page 90, lines 9-25, page 91, lines 1-9.]

B. Tme And Manner Petitioner Raised Federal Question Issues And How Said Issues Were Passed Upon By The Courts Below

a. Proceedings in the 232nd District Court of Harris County, Texas

Danny Joe McGee, Petitioner, was indicted on January 1, 1998 in the 232nd District Court of Harris County, Texas for the felony offense of Possession of a Controlled Substance, namely Cocaine. [C.R., Vol. 1, page 5]. Petitioner initially plead not guilty and filed his written Amended Motion to Suppress Evidence on March 30, 1998 alleging that the crack cocaine evidence seized from Petitioner's anal area by Officer Rowan was pursuant to an unreasonable arrest, search and seizure in violation of Petitioner's rights guaranteed under the *Fourth Amendment to the U.S. Constitution* and *Article One (1) Section Nine (9) of the Texas Constitution* and therefore inadmissible under the *U. S.*

Constitution and *Texas Code of Criminal Procedure Proc. Art. 38.23(a).* [C.R., Vol. 1, pages 15-16]. An oral hearing was held on Petitioner's Amended Motion to Suppress on March 26, 1998 and March 30, 1998. (C.R., Vols. 1-2]. On March 30, 1998, the 232nd District Court of Harris County, Texas denied Petitioner's Amended Motion to Suppress. [R.R., Vol. 2, page 104, line 2; C.R., Vol. 1, page 17]. Upon the court's denial of Petitioner's Motion to Suppress, on April 3, 1998, Petitioner entered a plea of guilty and the court set punishment pursuant to Petitioner's plea agreement with the State at ninety (90) days confinement in Harris County Jail under Texas Penal Code § 12.44 (a). [C.R., Vol. 1, pages 19-20, 25-26)]. Petitioner reserved the right to appeal the court's denial of Petitioner's Amended Motion to Suppress. [C.R., Vol. 1, page 22, No. 4]. Petitioner timely filed his Notice of Appeal to the Court of Appeals of Texas - Fourteenth District on April 28, 1998. [C.R., Vol. 1, p.28-29].

b. Issues raised on appeal to the Court Of Appeals of Texas - 14th District

In Petitioner's brief on appeal to the Court of Appeals, Petitioner raised the following federal questions(Appendix A-59):

> "I. Warrantless and unreasonable search and seizure of crack cocaine evidence from Appellant pursuant to an illegal and unreasonable lower body strip search, visual anal cavity search, search between Appellant's butt cheeks and probing search inside Appellant's anal cavity in violation of the Fourth (4TH) Amendment of the United States Constitution and Article One (1) Section Nine (9) of the Texas Constitution
>
> II. Warrantless arrest and unreasonable search and seizure of crack cocaine evidence from Appellant pursuant to an unlawful warrantless arrest and search of appellant in violation of the Fourth (4TH)

> Amendment of the United States Constitution and Article One (1) Section Nine (9) of the Texas Constitution and Texas Code of Criminal Procedure Articles 14.01, 14.02, 14.03, 14.031, and 14.04"

c. Holding and rationale of the Court Of Appeals of Texas - 14th District

A divided panel of the Court of Appeals of Texas reversed the trial court's decision (Appendix A-23), dissent by Judge Hudson.(Appendix-42) The majority held that the arrest of Petitioner was supported by probable cause but was invalid under Texas law statutory exceptions for a warrantless arrest. Texas Code of Criminal Procedure Annotated art. 14.04 provides:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

Tex. Code Crim. Proc. Ann. Art. 14.04 (Vernon 1994). The majority held that since the State offered no evidence that Petitioner was about to escape, the State failed to meet its burden under Texas' statutory exception to the warrantless arrest of Petitioner. Since the court found that Petitioner's arrest was invalid under State law, the court did not address Petitioner's Constitutional challenge to the arrest. However, the court did address Petitioner's Constitutional challenge to the search. Upon careful consideration of the nature of Petitioner's privacy interests, scope, manner and means, alternatives, justification and location where the search was conducted, the majority made the following conclusions: (a) due to the privacy interests involved in cavity searches, there is a need for courts to give close scrutiny to them; (b) there was insufficient evidence to support the conclusion that Petitioner's privacy interests were adequately protected at the fire station; (c) cavity

searches based on little more than tips from unnamed informants is clearly beyond the parameters of the Fourth Amendment; (d) in balancing the alternatives available against Petitioner's privacy interest, due to the ease in which alternatives could have been effected, the officers acted unreasonably in failing to recognize or pursue the alternatives; and (e) the fact that the search was not conducted in a separate room nor at the police station where the opportunity to better protect the privacy of Petitioner would have been available was a factor that weighed in favor of suppressing the contraband recovered from Petitioner. Accordingly, the majority concluded that the cavity search was unreasonable in violation of Petitioner's Fourth Amendment rights and therefore the contraband seized from Petitioner should have been suppressed. The court specifically recognized that neither the United States Supreme Court or any Texas court has addressed the specific issue presented by this case of when a strip search or body cavity search incident to arrest may or may not be appropriate. *McGee v. State of Texas,* 23 S.W.3d 156, 166 (Tex.App.-Houston[14th Dist.] 2000).

d. Holding and rationale of the Court Of Criminal Appeals of Texas

The Court of Criminal Appeals of Texas' jurisdiction was invoked when the court granted the State's Petition For Discretionary review of the Court of Appeals judgment.

A divided panel of 6 justices of the Court of Criminal Appeals of Texas reversed the Court of Appeals' decision (Appendix A-1), dissent by Judge Price, in which Judge Meyers joined.(Appendix A-15).

The majority held that the arrest of Petitioner was supported by probable cause and also valid under Texas law statutory exceptions for a warrantless arrest. Texas Code of Criminal Procedure Annotated art. 14.01(b) provides:

"A peace officer may arrest an offender without a

> warrant for any offense committed in his presence or within his view."

Tex. Code Crim. Proc. Ann. Art. 14.01(b) (Vernon 1994). The majority held that since the officer was able to confirm the location, description and identity of Petitioner consistent with the tip, coupled with the observation of smoke in the air, the smell of marijuana emitting from Petitioner and the finding of marijuana in the area, said factors were consistent the offense of possession of marijuana and sufficient to provide Officer Rowan with probable cause to arrest Petitioner under Article 14.01(b) without having to obtain a warrant. Still further, after considering the factors of scope, manner, justification and location where the search was conducted, the majority concluded the following: (a) although the search may have been an uncomfortable experience for Petitioner, such uncomfortableness was not sufficient to classify the search as violent; (b) although Officer Rowan had no formal training, his work experience qualified him to perform the search; (c) based on the totality of the circumstances, Officer Rowan had sufficient justification to believe that the cavity search was necessary; (d) although the fire station where the search was conducted was not as sterile environment as a hospital, on the whole the place where the search was conducted was reasonable and a less sterile environment was satisfactory; and (e) although Petitioner was not taken to a separate room at the fire station, but rather to a separate location, such separate location was sufficient to protect the privacy interest of Petitioner. Accordingly, the majority concluded that the cavity search was a reasonable search under the Fourth Amendment as a search incident to arrest, thereby excusing the officer's need to obtain a search warrant. The Court of Criminal Appeals also specifically recognized that the question of whether a search incident to an arrest includes a visual body-cavity search was one of first impression in the court. *McGee v. State of Texas,* 105 S.W. 3d 609, 615 (Tex.Crim.App 2003).

REASONS FOR GRANTING THE PETITION

In addition to collateral issues, the most compelling and significant specific issue raised by the facts of this case has not before been passed upon by this Court. Neither has any of the Circuit Courts squarely and definitively tackled the issues presented in this petition.

More specifically, the facts and circumstances of this case raise the question for the first time in this Court of whether or not and under what circumstances is it Constitutionally permissible for the comrnon street police officer to conduct a warrantless visual or probing body cavity search incident to an arrest when the search is absent exigent circumstances and when the search is not conducted at a border crossing, penal institution, hospital, police station house or jail facility.

The Texas courts admit that the issues raised in this petition were of first impression in their courts. The Court of Appeals of Texas went even further and stated that it could locate no authority from this Court that specifically addressed the question of when a strip search or body cavity search incident to arrest may or may not be appropriate. In other words, under the general umbrella of Fourth Amendment standards of reasonableness, what are the general parameters of reasonableness as to scope, justification, manner and location to be adhered to by street police officers as pertaining to body cavity searches conducted pursuant to a warrantless arrest when there are no exigencies and the search is not conducted at a border crossing, penal institution, hospital, police station house or jail facility.

This issue is of paramount importance because the police officer involved in this case has stated that it is a rather common occurrence for street officers to have pre-arrest or post-arrest contact with individuals who may have secreted crack cocaine in their anuses. There is an essential need for this Court to speak to these street cops and police departments throughout the land. This Court must inform them of the standards of Constitutionally reasonableness they must adhere to when confronted on the streets

with a pre- or post-arrest situation where an individual may or may not have crack cocaine stored in her anus so that the zealous cop will know exactly what he can and cannot do to retrieve it.

Additionally, there is an essential need for this Court to provide guidance to the courts of the State of Texas and courts of other states as well as the several Federal Courts as pertaining to the standards of reasonableness to be applied in situations to which the facts of this case speak to.

A. The Circuit Courts Decisions

When the Court of Criminal Appeals attempted to locate cases to support its holding, it cited, among others, *Blackburn v. Snow*, 771 F. 2d 556, 564 (1st Cir. 1985), *Rivas v. United States*, 368 F. 2d 703, 710 (9th Cir. 1966), cert. denied 386 U.S. 945 (1967), *Haguez v. United States*, 406 F. 2d 366, 382 (9th Cir. 1968), *Logan v. Shealy*, 660 F. 2d 1007, 1014 (4th Cir. 1981) even though all of these cases are factually and legally distinguishable from the case at bar.

Blackburn involved a penal institution's policy to conduct anal cavity searches of visitors to the prison. *Blackburn*, at 771 F. 2d 556, 564 (1st Cir. 1985). *Rivas* involved a border anal cavity search performed by a physician of a convicted smuggler who appeared to be under the influence of narcotics when crossing the border. *Rivas*, at 368 F. 2d 703, 710 (9th Cir. 1966). *Haguez* involved a violent border anal cavity search performed by a physician of an individual crossing the border. *Haguez*, at 406 F. 2d 366, 382 (9th Cir. 1968). *Logan* involved a custodial strip search of a person who was still being detained at the police station after lawfully being arrested for Driving While Intoxicated. The strip search was performed pursuant to a municipal policy. *Logan*, at 660 F. 2d 1007, 1014 (4th Cir. 1981). Accordingly, neither *Blackburn*, *Rivas*, *Haguez*, nor *Logan* address the novel issues raised by this case and are therefore not controlling on all fours as applicable precedents to the case at bar. *Blackburn*, at 771 F. 2d

556, 564 (1st Cir. 1985), *Rivas,* at 368 F. 2d 703, 710 (9th Cir. 1966), *Haguez,* at 406 F. 2d 366, 382 (9th Cir. 1968), *Logan*, at 660 F. 2d 1007, 1014 (4th Cir. 1981).

The reason that the court below cited so many cases that were only tangentially relevant to this case is because the facts of this case are significantly materially different from cases in which the Circuit courts have had to deal with.

B. The Importance of this Case to the General Public

The importance of this case to the general public cannot be overemphasized and can be summed up with two names - Damion Williams and Camilo Vargas. At the time of the occurrence of the incident in question in December, 1997, they both were juveniles. There is no dispute that, at a minimum, Petitioner was required to expose his anus to Officer Rowan during the search. The following are excerpts of Officer Rowan's testimony relative to the search he performed on the two juveniles:

> Q. What did you do upon recovering the narcotics?
>
> A. After I recovered the narcotics we checked the remaining suspects in somewhat the same manner due to the circumstances and the evidence was tested showed positive for -- tested positive for cocaine.
>
> Q. Okay. Let me back up. Let me make it clear for you. Right now I want you to limit your consideration to three suspects okay. Three suspects that you've named all right. Other than Mr. McGee there were two additional suspects correct?
>
> A. Yes.
>
> Q. All right. And, you just stated that you proceeded to do them the same manner that you did Mr. McGee correct?

A. I stated, I believe, we proceeded to search them yes that is correct.
Q. Okay. My question is in the same manner that you searched Mr. McGee?
A. Yes.
Q. Okay. Now you were aware that they were juveniles correct?
A. I was aware they were under the age of 17, yes.

[R.R., Vol. 2, page 61, lines 20-25; R.R., Vol. 2, page 63, lines 11-25; R.R., Vol. 2, page 64, lines 1-3]

But the juveniles were released. Although Damion Williams and Camilo Vargas are not before this Court, if this Court is of the same opinion as the court below that the search of Petitioner was reasonable under the Fourth Amendment, then the search of Damion Williams and Camilo Vargas was reasonable also because the only difference between the searches is that the search of Petitioner's anus was fruitful whereas the search of Williams' and Vargas' anuses was not. In the absence of exigent circumstances, why was Officer Rowan searching the anal cavities of Williams and Vargas? If Officer Rowan's actions reflect the state of law enforcement in America, then the same degradation and humiliation experienced by Petitioner, Williams and Vargas could befall any girl or boy or adult male or female who should have the misfortune of finding themselves under circumstances which are the same or similar as those reflected in the facts of this case. Officer Rowan went fishing for crack cocaine. After examining three wide-spread-open anuses, he hit the jackpot in the anus of Petitioner. Does the lower court's ruling mean that it is now Constitutionally permissible for an untrained female or male police officer to examine the vagina or anus of a female suspect for contraband without a warrant and without exigent circumstances on the mere chance that contraband may be found?

When Officer Rowan was initially asked about his training in strip searches he testified to the following:

Q. Now, with respect to Mr. McGee's buttock or anus you did have that exposed correct, to do what you had to do?
A. Yes that was visible.
Q. So with respect to that part of his body you performed the strip search didn't you?
A. That area was devoid of clothing, yes.
Q. So you performed a strip search with respect to that part of the body?
A. That specific, area, yes.
Q. Okay. Now what is HPD's policy on strip searches? MR. GRANT: Objection Your Honor relevance. THE COURT: Sustained.
Q. Okay. Do you have training on strip searches?
A. I, sir, have never heard searches referred to as strip search in my experience.

[R.R., Vol. 2, page 70, lines 7-24].

When officer Rowan was asked about Houston Police Department policy relative to his actions, he testified as follows:

Q. Is it the policy of a police station to take individuals to fire stations the way you did Mr. McGee and the others to conduct a search of the type that you did?
A. As far as the Houston Police Department's policy?
Q. Yes.
A. Not that I'm aware of.
Q. So you didn't follow policy?
A. It's a common practice among police officers.
Q. So it's an informal policy among places to at least do that?

A. I would say —— I'm sorry sir I don't know where your question is going with this.
Q. You don't have to.
A. Well I mean I don't understand the question as I was ——
Q. What part of the question didn't you understand so I can make sure I get that part right?
Q. It's a common practice among police officers to take people to the fire stations and do the kind of searches that you did?
A. Where I was working, yes.
Q. And you know of other officers that do that also?
A. Yes.
Q. Okay. How many occasions did you use this particular fire station?
A. I believe this is the one and only occasion I can recall of.
Q. Have you used other fire stations?
A. Yes.

[R.R., Vol. 2, page 75, lines 11-25; page 76, lines 1-3, 14-25].

For the sake of Damion Williams and Camilo Vargas and the innocent public who might similarly be victimized by police officers like Officer Rowan, the facts of this case begs this Court to make a clear pronouncement on what protection does the Fourth Amendment afford against law enforcement who feel that they have a justifiable legitimate need to examine private parts and anuses for contraband.

C. The Decision of the Court of Criminal Appeals is Incorrect

The decision of the majority below is wrong. Although, there are many sub-issues which form the basis of the court's error including reliability of anonymous information, reliability of

anonymous information which omits prediction of future behavior, reliability of anonymous information for the purposes of investigative detention versus probable cause for arrest, scope of an investigative detention and scope of search pursuant to an investigative detention, the crux of the court's error in failing to find the search of Petitioner unreasonable under the Fourth Amendment can be summed up in one phrase - "*lack of exigent circumstances*". In failing to deal with the subject of exigent circumstances, the court below completely failed to recognize or even address one of the most basic requirements for a close scrutiny warrantless personal privacy intrusion.

Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826 (1966) was one the first cases that this Court pronounced standards of reasonableness relating to the obtaining of evidence from below the surface of the skin. Relative to health and safety concerns, the Court stated as follows:

> Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even the most rudimentary sort, were made by other than medical personnel or in other than a medical environment - for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

Schmerber, 384 U.S. 757, 86 S.Ct. 1826, 1836(1966). It may have taken 37 years, but finally, with this case, this Court is faced with the serious question that *Schmerber* anticipated - that is, an anal cavity search performed by an admitted untrained police officer,

that not only was not even conducted at the privacy of the stationhouse, which according to *Schmerber* would still be suspect, but rather was conducted at a place even more further removed - a public fire station. *Id.*

When Harriett Williams was questioned about the search of Damion Williams, she testified as follows:

Q. Okay. Now with respect to December 20, 1997 did you notice something unusual with respect to your son after he came home that day?
A. Yes.
Q. And what did you notice?
A. Damian was in the restroom. He came out and I went in.
Q. And, why did you go in the restroom?
A. 'Cause he had came home and he told me the police officer had search him and went up in his rectum.
Q. Okay. And after you were in the restroom did you discover any evidence of that?
A. Yes.
Q. What did you discover?
A. Damian underwears was in the trash can and I picked them up.
Q. And what was in the underwear?
A. It was some stool in the underwear.
Q. Had you ever known Damian to —— since he's been an adult or not a baby to --
A. Not at all.
Q. To use the restroom on himself?
A. No, not at all.

[R.R., Vol. 2, page 90, lines 12-25; page 91, lines 1-9].

It seems reasonable to conclude that Harriett Williams'

finding of "feces" in her son's discarded underwear immediately after Officer Rowan's search is exactly the kind of health risk that *Schmerber* cautions against. *Id.*

In *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 2041 (1969), this Court held as follows relative to warrantless searches:

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police.....We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Chimel, 395 U.S. 752, 89 S.Ct. at 2039 (1969), citing *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 193 (1948).

Finally, this Court has held that in order to conduct the type of search that was Performed on Petitioner, there must exist both probable cause and especially exigent circumstances. *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 1324 (1983).

How do we know that there were no exigent circumstances - because Officer Rowan said so when he testified as follows:

> Q. Now, once you found the cocaine is that when you formally put Mr. McGee under arrest?
> A. Yes at that time he was placed under arrest.
> Q. Prior to that time he was just an investigation and you were not arresting him?
> A. It was a continuing investigation, yes.
> Q. Now there were no exigent circumstances were there? MR. GRANT: Objection Your Honor. I believe that calls for a legal

conclusion as well. THE COURT: Sustained.

Q. Was there any type of emergency involved?
A. Emergency?
Q. Yeah.
A. No, sir.
Q. No emergency correct? Did you have time to obtain a warrant? MR. GRANT: Objection Your Honor relevance. THE COURT: Overruled.
A. A warrant for the search of Mr. McGee sir, is that correct? Is that the question you're asking?
Q. Yes a warrant to conduct the searches pursuant to your investigation?
A. I'm not even sure that never anybody has ever utilized a warrant in this circumstance.

R.R., page 85, lines 11-25; page 86, lines 1-14]

D. The Decision of the Court of Criminal Appeals is in Conflict with Federal Law

The decision below is in conflict with well established Fourth Amendment Constitutional law standards of reasonableness.

Petitioner was absolutely sure about the crack cocaine being completely inside his anus. Upon cross examination by the prosecutor relative to the location of the crack cocaine, Petitioner testified as follows:

Q. Where did they find the items that they were searching for?
A. In my butt.
Q. And your testimony is that this item was inside your anal cavity is that correct? Was part of it sticking out at all?

A. No, sir.
Q. You weren't taking this item out and passing rocks to other people and then putting it back in there?
A. No, sir.
Q. Okay. Is it possible that it was sticking partially in? Is it possible that it was sticking partially out of your anal capacity?
A. No, sir.
Q. So you rammed it up there pretty good is what you testified to?
A. No response.

[R.R., Vol. 2, page 48, lines 21-25; page 49, lines 1-2, 6-8,13-19]

It is clear, whether gleaned from Officer Rowan's testimony or Petitioner's testimony, that the evidence seized from Petitioner was below the surface of the skin and not in plain view. But the issue before the Court is not whether the evidence was above or below the surface of the skin, but rather, given that there can be no doubt that the search was of the highly intrusive type, in upholding the search, did the court below adhere to the standards of Constitutional reasonableness established by the Federal Courts? The answer is an unequivocal "NO".

The more intrusive a particular search or seizure is, the heavier is the government's burden of proving the reasonableness of that search or seizure. *United States v. Lilly*, 576 F.2d 1240, 1245-1246 (5th Cir. 1978), reh. denied 599 F.2d 619 (1979). Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. *Schmerber v. State of California*, 384 U.S. 757, 86 S.Ct. 1826, 1835 (1966). The interest in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion on the mere chance that desired evidence might be obtained. *Id.*, at 1835.

To prove the legal validity of a particular body cavity search, however, the government still must show that the search and seizure was reasonable under all the facts and circumstances. *United States v. Lilly*, 576 F.2d at 1246.

Strip searches are highly intrusive, demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive and signifying degradation and submission. *United States v. Lilly*, 576 F.2d at 1246; *Mary Beth G. v. City of Chicago*, 723 F.2d. 1263, 1272 (7th Cir. 1983); *Timberlake v. Benton*, 786 F.Supp. 676, 691 (M.D. TN 1992). There can be no doubt that a strip search is an invasion of personal rights of the first magnitude. *Chapman v. Nichols*, 989 F.2d. 393, 395 (10th. Cir. 1993). The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute. *Id.*, at 396. The government always must show that a legitimate need necessitated the search, that the need could not have been satisfied by a more narrow means, and that the search and any consequent seizure were conducted in a reasonable manner. *United States v. Lilly*, 576 F.2d at 1246. When the police have not decided to take a person into custody, there is little justification for a full search. *Timberlake*, 786 F.Supp., at 689. Therefore, to conduct an involuntary non-custodial warrantless strip search of a person, when there is no decreased expectation of privacy, requires both probable cause and especially exigent circumstances. *Florida v. Royer*, 460 U.S. 451, 103 S.Ct. 1319, 1324 (1983); *Timberlake*, 786 F.Supp., at 691. Exigent circumstances has been interpreted to mean circumstances requiring immediate seizure of highly evanescent evidence or evidence that would be destroyed. *Graves v. Beto*, 424 F.2d. 524, 525 (5th Cir. 1970), cert. denied 400 U.S. 960, 91 S.Ct. 353 (1970); *Fuller v. M.G. Jewelry*, 950 F.2d. 1437, 1450 (9th Cir. 1991); *Timberlake*, 786 F.Supp., at 690. The *Fuller* court in dealing with the requirement of exigent circumstances relative to a visual body cavity search in an attempt to locate a stolen a ring where their was probable cause and reasonable suspicion that such ring was secreted in a body cavity stated as follows:

> There was no risk that the ring, if hidden in a body cavity, would have been discarded or destroyed....In a custodial setting, the police could have easily guarded against the possibility that one of the Fullers would remove the ring from a body cavity by observing them while a warrant was obtained....In sum, there were no exigent circumstances to excuse the failure to obtain a warrant. .

Fuller, 950 F.2d at 1450

The crux of the exigent circumstances exception is that the officer or others may be harmed if the officer does not act immediately. *Barlow v. Ground*, 943 F.2d 1132, 1139 (9th Cir. 1991), cert. denied 505 U.S. 1206, 112 S.Ct. 2995 (1992). *Barlow* went further and held that if a warrantless search does not fall under a specifically established and well-delineated exception, it is per se unreasonable. *Id.*, at 1139. The exigent circumstances to excuse the failure to obtain a warrant is required even in a custodial setting. *Fuller*, 950 F.2d at 1450. *Barlow*, citing *Graves*, 424 F.2d. at 525, stated that the Fifth Circuit held that *Schmerber* did not permit a warrantless search for evidence that was not evanescent. Stated another way, the officer must be confronted with an emergency in which the delay necessary to obtain a warrant, under the circumstances would threaten the destruction of the evidence. *Barlow*, 943 F.2d at 1138; *Schmerber*, 384 U.S. 757, 86 S.Ct., at 1835.

In upholding the search, it is clear that the Court below grossly deviated from well settled Fourth Amendment standards of reasonableness which were established by this Court and the Federal Circuit courts long ago.

CONCLUSION

This case presents an issue of grave importance. Recitation of the transcription of testimony taken in this case was necessary so as to clearly elucidate a visual of the extreme nature of the actions of Officer Rowan. Its has long ago been established that strip searches, visual anal cavity searches or probing anal cavity searches are invasions of personal privacy rights of the highest magnitude. Our Constitution is no respecter of persons. It applies equally to the lawful as well as the lawless. It appears that we are now living in a society where it has become common place for individuals who may choose to break the law and in attempt to avoid detection may insert contraband inside a body cavities. In such an atmosphere, on a daily basis, the ordinary street cop is now confronted head-on with the conflict between the competing forces of the need for law enforcement and the mighty shield of the general public's guarantees under the Fourth Amendment against unreasonable searches and seizures. This case presents the conflict squarely in a manner and in a particular set of circumstances not heretofore faced and ruled upon by this Court.

Accordingly, Danny Joe McGee, III's petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 1408-00

DANNY JOE McGEE, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY

Keasler, J., *delivered the opinion of the Court, joined by* Keller, P.J., *and* Womack *and* Hervey, J.J., *and joined in part by* Johnson, Holcomb, *and* Cochran, J.J. Cochran, J., *filed a concurring opinion, joined by* Johnson *and* Holcomb, J.J. Price, J., *filed a concurring and dissenting opinion joined by* Meyers, J.

OPINION

Danny Joe McGee argues that the crack cocaine retrieved from between his buttocks during a visual body cavity inspection should have been suppressed because it was the product of a warrantless arrest and the fruit of an unconstitutional search. We disagree.

Statement of Facts

The evidence, viewed in the light most favorable to the trial court's ruling,[1] showed that on December 20, 1997, Officer Rowan received a tip from a concerned citizen that McGee and two other men were selling crack cocaine at the intersection of Fleming and Cool Wood. The citizen gave Officer Rowan the names of McGee and one other man, and a detailed description of the clothing of all three. The citizen also told Officer Rowan that McGee was hiding the crack cocaine between his buttocks. It is uncertain whether Officer Rowan had relied on the informant in the past because he provided contradicting testimony, stating at first that he had relied on the informant in the past, then later denying prior use of the informant.

Officer Rowan went to the location and found three men who matched the description. Upon approaching the men, the officer smelled marijuana and saw blue smoke surrounding the men. Officer Rowan testified that based on his training and experience, the blue smoke was from marijuana. He asked the men for identification and corroborated the two names provided by the citizen. The officer then checked the men for weapons and searched the area where they were standing. Although there were no weapons, a cigar containing marijuana was discovered on the ground. McGee admitted that at least one person was smoking marijuana when Officer Rowan approached the group, although he denied that he was smoking marijuana.

Officer Rowan handcuffed the three men, placed them in the squad car, and drove to a nearby fire station. At the fire station, Officer Rowan took McGee to a secluded area of the station and compelled McGee to drop his pants, bend over, and spread his buttocks. Officer Rowan proceeded to perform a visual search of McGee's anal region. The officer testified that he saw several rocks of crack cocaine wrapped in red plastic in plain view lodged

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1 *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

between McGee's buttocks. He further testified that the crack cocaine was not inside McGee's anus, but when the cocaine was exposed, McGee attempted to push it into his anus. Officer Rowan testified that he was able to retrieve the drugs before McGee pushed them into his anus without digitally probing the anus. McGee was then charged with possession of cocaine.

Procedural History

Before trial, McGee presented his motion to suppress evidence, which the trial court denied after a hearing. McGee then pled guilty to the charge of possession of cocaine weighing less than one gram and was sentenced to 90 days' confinement. McGee subsequently filed a notice of appeal claiming that the trial court erred in denying his motion. Specifically, McGee argued that the evidence recovered was the fruit of (1) an unconstitutional arrest not justified by the Texas Code of Criminal Procedure and (2) an unconstitutional search. The court of appeals agreed with McGee, holding that the evidence seized was the product of a warrantless arrest not justified by Articles 14.01, 14.03, or 14.04 of the Texas Code of Criminal Procedure.[2] It also held that the body cavity search was unreasonable and so the fruits of the search should have been suppressed.[3] We granted the State's petition to review both rulings.

Analysis

I. Warrantless Arrest

The State argues that the Court of Appeals erred in concluding that none of the statutory requirements to justify a warrantless arrest were proven. When a defendant seeks to suppress evidence on the basis of an illegal arrest, the burden of

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2 *McGee v. State*, 23 S.W.3d 156, 161-66 (Tex. App.–Houston [14th Dist] 2000).

3 *Id.* at 168.

proof is placed on the defendant to rebut the presumption of proper conduct.[4] The defendant may satisfy this burden by establishing that he was arrested without a warrant.[5] Once this is shown, the burden shifts to the State to either produce evidence of a warrant or prove the reasonableness of the arrest.[6] The State demonstrates reasonableness by showing that one of the statutory exceptions to the warrant requirement has been met.[7]

The evidence presented during the suppression hearing established that McGee was arrested without a warrant. And neither party contests that there was a warrantless arrest. So the burden shifted to the State to prove that the requirements of a warrantless arrest were satisfied. This is where the substance of the State's petition lies.

A. Article 14.01(b)

In its second ground for review, the State challenges the appellate court's conclusion that Article 14.01(b) was not satisfied by the State. In Texas, a warrantless arrest is permitted only when (1) probable cause for the arrest exists and (2) at least one of the statutory exceptions to the warrant requirement is met.[8] Article 14.01 (b) provides:

A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Probable cause exists where police have reasonably trustworthy information sufficient to warrant a reasonable person to believe that a particular person has committed or is committing an

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4 *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986).

5 *Id.*

6 *Id.* at 9-10.

7 *See generally* TEX. CODE CRIM. PROC. ANN. chapt. 14 (Vernon 1981).

8 *Stull v. State*, 772 S.W.2d 449, 451 (Tex. Crim. App. 1989).

offense.[9] This court has previously upheld arrests under Article 14.01(b) when police officers personally observed behavior that was not overtly criminal but when coupled with the officers' prior knowledge produced probable cause.[10] For instance, in *Lunde*, officers received a tip from an informant with personal knowledge that the defendant was dealing heroin. Officers went to the specified location and confirmed the physical description given by the informant. They then saw the defendant engage in behavior officers described as consistent with a drug transaction. Though the court pointed out that the behavior witnessed was not an overt criminal act, it upheld the warrantless arrest under Article 14.01(b) based on the prior information received from the informant.

Here we have nearly identical facts. An informant approached Officer Rowan and relayed information about criminal activity he had witnessed. The informant provided Officer Rowan with a detailed description of McGee. He told the officer that McGee was wearing a "yellow rain slicker, black rain pants, and a black stocking cap," and that McGee could be found on the corner of Fleming and Cool Wood. The informant also provided McGee's name and the name of one of his two companions. The informant was concerned that McGee was selling crack cocaine in the area and that he was hiding the cocaine between his buttocks. Based on this tip, Officer Rowan proceeded to the corner of Fleming and Cool Wood and saw that a person standing there, McGee, matched the description provided by the informant because he was wearing a yellow rain coat, black rain pants, and a black cap. The officer then asked the men for identification and their names matched those provided by the informant. He observed marijuana smoke in the air above McGee and a marijuana cigarette on the ground next to him. He also smelled the odor of marijuana emanating from McGee. The cloud of marijuana smoke in the air, the smell of marijuana,

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9 *Amores v. State*, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991).

10 *See Miller v. State*, 458 S.W.2d 680 (Tex. Crim. App. 1970); *Lunde v. State*, 736 S.W.2d 665 (Tex. Crim. App. 1987).

and the marijuana cigarette were consistent with the offense of possession of marijuana. When coupled with the officer's prior knowledge supplied by the informant, the observations were sufficient to provide Officer Rowan with probable cause to arrest under Article 14.01(b).

Therefore, Article 14.01(b) excused Officer Rowan from having to obtain an arrest warrant. Because we hold that the arrest was justified under 14.01(b), we need not consider the State's first and third grounds for review concerning Articles 14.03 and 14.04.

II. Unconstitutional Search

A. Search Incident to Arrest

Pursuant to the Fourth Amendment, a warrantless search of either a person or property is considered per se unreasonable subject to a "few specifically defined and well established exceptions."[11] The Supreme Court has held that voluntary consent to search, search under exigent circumstances, and search incident to arrest are among these exceptions.[12] It is the State's burden to show that the search falls within one of these exceptions.[13] The State claims that since McGee was legally arrested, the search was reasonable as a search incident to arrest. A search incident to arrest permits officers to search a defendant, or areas within the defendant's immediate control, to prevent the concealment or destruction of evidence.[14] But it is unclear whether the exception permits officers to conduct the type of search that was performed on McGee.

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11 *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).

12 *United States v. Edwards*, 415 U.S. 800, 808-09 (1974) (search incident to arrest); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (voluntary consent); *Vale v. Louisiana*, 399 U.S. 30, 34-36 (1970) (exigent circumstances).

13 *McDonald v. United States*, 335 U.S. 451, 454 (1948).

14 *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

There are several different forms of searches, each involving a different degree of intrusion. Courts classify some of the more intrusive searches as "strip searches," "visual body-cavity searches," and "manual body-cavity searches."[15] The term "strip search" generally refers to an inspection of a naked person, without any scrutiny of the person's cavities.[16] A "visual body-cavity search" includes a visual inspection of a person's anal or genital areas.[17] A "manual body-cavity search" involves some degree of probing or touching a person's body cavities.[18] Officer Rowan testified that he ordered McGee to bend over and spread his buttocks for inspection, but that he did not touch or probe McGee's anus. So here we are confronted with the legality of a visual body-cavity search. The question of whether a search incident to arrest includes a visual body-cavity search is one of first impression in this Court. We turn to existing case law for guidance in our determination.

In *United States v. Robinson*, the Supreme Court has held that a search incident to arrest authorizes the police to conduct "a full search of the person."[19] But *Robinson* did not do away with the requirement that all searches be reasonable, nor did it hold that all searches to arrest, no matter how intrusive, are per se reasonable.[20] "To the contrary, since *Robinson*, the Supreme Court has continued to emphasize that Fourth Amendment jurisprudence prohibits unreasonable searches incident to arrest."[21] So to determine

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15 *See, e.g. Blackburn v. Snow*, 771 F.2d 556, 561 n.3 (1st Cir. 1991); *Deserley v. Department of Corrections*, 995 P.2d 972, 976 n.1 (Mont. 2000); *Hughes v. Commonwealth*, 524 S.E.2d 155, 159 (Va. Ct. App. 2000) (en banc).

16 *Blackburn*, 771 F.2d at 561 n.3.

17 *Id.*

18 *Id.*

19 *United States v. Robinson*, 414 U.S. 218, 236 (1973).

20 *See Amaechi v. West*, 237 F.3d 356, 361 (4th Cir. 2001).

21 *Id.* (*citing Illinois v. Lafayette*, 462 U.S. 640, 645 (1983)).

whether the search was constitutional, it is not enough to determine that it was a search pursuant to arrest as the State contends. Rather, we must determine whether the search was reasonable.

In *Bell v. Wolfish*, the Supreme Court held that a reasonableness inquiry requires a court to balance the need for the particular search against the invasion of the personal rights that the search entailed.[22] Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.[23] Each analysis will turn on the particular facts and circumstances of the underlying case.[24] No one factor is determinative.

1. Scope of the Intrusion

Visual body-cavity searches are among the most intrusive of searches.[25] Its intrusiveness "cannot be overstated."[26] We agree with the Court of Appeals that visual body-cavity searches can be "demeaning, dehumanizing, undignified, humiliating, [and] terrifying...."[27] However, our inquiry does not end here. We must still determine whether the legitimate interests of law enforcement outweigh the intrusiveness of the search.

2. Manner in which Search was Conducted

In reviewing a visual body-cavity search, we must decide

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22 441 U.S. 520, 559 (1979).

23 *Id.*

24 *U.S. v. Lilly*, 576 F.2d 1240, 1246 (5th Cir. 1978).

25 *See Wolfish*, 441 U.S. at 558; *United States v. Lilly*, 576 F.2d 1240 (5th Cir. 1978); *Patterson v. State*, 598 S.W.2d 265, 269 (Tex. Crim. App. 1980).

26 *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 711 (9th Cir. 1989).

27 *McGee*, 23 S.W.3d at 167 (*citing Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997); *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983)).

whether, on the whole, the manner in which the search was conducted was reasonable.[28] One factor we may consider is whether the search was violent.[29] While it may have been an uncomfortable experience for McGee, that is not sufficient to classify the search as violent.

We may also consider whether the officers conducting the search had training and/or experience in conducting such searches.[30] Officer Rowan testified that while he had never had formal training for conducting cavity searches, he had on-the-job experience while working with senior officers. He also stated that it was commonplace for criminals to hide narcotics in their body cavities. So while Officer Rowan never had formal training, we find that his work experience qualified him to perform the search in this instance.

So we conclude that the manner in which the search was conducted was reasonable, which weighs in favor of the conclusion that the search was reasonable.

3. Justification for the Search

The Supreme Court has upheld the use of visual body cavity searches based on suspicion short of probable cause.[31] There is some debate among the courts as to what level of justification an officer must have before being permitted to perform a visual cavity search.[32] A distinction is also made for body cavity searches

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28 *See Del Raine v. Williford*, 32 F.3d 1024, 1040-41 (7th Cir. 1994).

29 *See Covino v. Patrissi*, 967 F.2d 73, 80 (2d Cir. 1992).

30 *Del Raine*, 32 F.3d at 1040-41.

31 *Wolfish*, 441 U.S. at 559-60.

32 *Compare Blackburn v. Snow*, 771 F.2d 556, 564 (1st Cir. 1985) (holding that body cavity searches should not be conducted on anything less than probable cause), *with Rivas v. United States*, 368 F.2d 703, 710 (9th Cir. 1966) (holding that more than a mere suspicion is necessary for warrantless body cavity searches).

performed at borders or in prisons, as suspects in those cases possess a diminished expectation of privacy.[33] In this case there was not a diminished expectation of privacy as McGee's search was not conducted at either a border or in a prison. But we have already established that the arresting officer had probable cause to believe that McGee was engaged in illegal activity. Probable cause is the highest level of justification employed by the courts. While we do not create a per se rule that probable cause always justifies a body cavity search, in this instance we find from the totality of the circumstances that Officer Rowan had sufficient justification to believe that a search was necessary.

4. Where the Search was Conducted

The Ninth Circuit has held that the search must be conducted in a hygienic environment where there is no risk of infection.[34] We agree. The search occurred in a fire station. Officer Rowan obtained sanitary rubber gloves to conduct the investigation. The fire station was not as sterile an environment as a hospital. But since Officer Rowan was merely visually inspecting the area between the buttocks and there was no penetration of McGee's anus, we believe on the whole it was reasonable. Given that there was no penetration of the body, a less sterile environment was satisfactory.

The Fourth Circuit provides additional guidance. It has held that an emphasis should be placed on whether the officer sought to protect the privacy interests of the individual by conducting the search in a private area.[35] That court noted that strip searches and body cavity searches involve such an intrusion that they should rarely, if ever,

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33 *See United States v. Montoya de Hernandez*, 473 U.S 531, 537-40 (1985) (dealing with border searches); *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (dealing with prison searches).

34 *Huguez v. United States*, 406 F.2d 366, 382 (9th Cir. 1968).

35 *See Logan v. Shealy*, 660 F.2d 1007, 1014 (4th Cir. 1981).

be conducted in public places.[36] We agree that visual body cavity inspections should not be conducted in a public place. Here Officer Rowan testified that he searched each of the suspects one at a time. Each was taken to a separate location, which the officer testified as being "more secluded" than the rest of the fire station. He also testified that only his partner was in the same area. Though Officer Rowan did not take McGee into a separate room to conduct the search, we find that he properly conducted himself so as to protect the privacy interests of McGee.

Three of the four factors weigh in favor of the conclusion that this search was reasonable. The trial court was correct in denying McGee's motion to suppress.

Conclusion

Because Article 14.01(b) of the Code of Criminal Procedure excused the arresting officer from having to obtain an arrest warrant, McGee's arrest was valid. Further, the visual body cavity search in this instance was a reasonable search incident to arrest, thereby excusing the officer's need to obtain a search warrant. The Court of Appeals was incorrect in holding that the cocaine should have been suppressed. We reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

DATE DELIVERED: April 23, 2003

PUBLISH

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36 *Id.*

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 1408-00

DANNY JOE McGEE, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY

Cochran, J., *filed a concurring opinion in which* Johnson and Holcomb, JJ., *joined.*

CONCURRING OPINION

I join all but Part IIA3 of the majority opinion. If the majority concludes that merely because Officer Rowan had probable cause to believe that appellant "was engaged in illegal activity," he therefore had authority to make a visual body cavity search, I respectfully disagree. I do not think that a visual body

cavity search is permissible as part of a routine search incident to arrest. But I also think that the trial court did not abuse its discretion by implicitly concluding that Officer Rowan had at least "reasonable suspicion" to believe that appellant had cocaine hidden between his buttocks.[1] Therefore, this was not a routine search, it was one specifically targeted to the very location a "concerned citizen"[2] said cocaine would be found on appellant. Because Officer Rowan had already confirmed that the other information that this "concerned citizen" had provided was accurate, the officer's conduct in conducting a highly intrusive visual body-cavity search was not unreasonable under the Fourth Amendment in this particular case.

The human body is a private sanctuary which is generally entitled to significant protection under the Fourth Amendment.[3] On the other hand, the human body is not "a sanctuary in which evidence may be concealed with impunity."[4] A person who intentionally uses a body cavity as a pocketbook cannot claim "King's X" when reasonable suspicion or probable cause points to that body-cavity pocketbook.

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1 *See Swain v. Spinney*, 117 F.3d 1,5 (1st Cir. 1997) (stating that police must have a "reasonable suspicion" that evidence will be found before conducting a visual body cavity search); *Justice v. Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992).

2 Appellant, the State, and the court of appeals all used the term "a concerned citizen" to describe the person who called Officer Rowan.

3 *See Bell v. Wolfish*, 441 U.S. 520, 558 (1979) (stating that the practice of strip and visual body cavity searches "instinctively gives us the most pause"); *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (quoting another court's description of visual body cavity searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission").

4 *People v. Scott*, 21 Cal.3d 284, 293, 578 P.2d 123 (1978); *see also Commonwealth v. Thomas*, 429 Mass. 403, 708 N.E.2d 669 (1999) (upholding warrantless visual body cavity search at police station because officer had, at the time he made search, probable cause to believe that defendant had cocaine hidden between his buttocks).

Cochran, J.
Filed: April 23, 2003
Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 1408-00

DANNY JOE McGEE, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY

DISSENTING OPINION

PRICE, J., ***filed this concurring and dissenting opinion, in which*** **Meyers, J.,** ***joined.***

In this case, we are called upon to decide whether the arrest and subsequent body- cavity search of the appellant were authorized, in the absence of a warrant, by the laws of Texas and the United States. I agree with the majority that the appellant's arrest was authorized under Article 14.01(b) of the Texas Code of Criminal Procedure. I disagree with the majority's position that the

visual body-cavity search performed at a local fire station was authorized by the United States Constitution. This search, which involved a bodily intrusion, was not supported by exigent circumstances.

Neither the United States Supreme Court, nor this Court, has determined whether a search incident to arrest may include a visual body-cavity search, today we address the question. Cases from federal courts and other states provide persuasive authority.

The United States Supreme Court has held that a search incident to a lawful arrest authorizes the police to conduct "a full search of the person." *United States v. Robinson*, 414 U.S. 218, 235 (1973). Police may also search the area within the arrestee's immediate control, *see Chimel v. California*, 395 U.S. 752, 763 (1969), and seize his or her personal effects that are evidence of the crime. *See United States v. Edwards*, 415 U.S. 800, 804-05 (1974).

A police officer's decision to conduct a search incident to arrest is largely free from judicial scrutiny before and after the arrest. The Supreme Court explained in *Robinson* that a police officers decision about how and where to search a person is "a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." *Robinson*, 414 U.S. at 235. The office 's authority to search incident to arrest is justified by the need to protect the officer's safety and to prevent the concealment or destruction of evidence. *Ibid.* The scope of the search must not exceed the justification for the search, however; this exception to the warrant requirement does not give officers unlimited authority to search an arrestee. *See Edwards*, 415 U.S. at 808 n.9.

The authority of the police under the Fourth Amendment to conduct a full search of an arrestee's person without a warrant is *only skin deep*. The policy considerations that justify the search incident to arrest - the need to disarm the suspect and to prevent the

destruction of evidence under the suspect's direct control - do not apply to searches involving intrusions beyond the body's surface. *Schmerber v. California*, 384 U.S. 757, 769 (1966).

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Id. at 769-70. The Supreme Court reaffirmed this principle when, in *Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 (1983), it explained that it was not addressing strip searches as incident to arrest in *Edwards*.

In many jurisdictions, the search of a body-cavity is considered an intrusion into the body under *Schmerber* that falls outside the permissible scope of a search incident to arrest.[1] I agree

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[1] *See United States v. Oyekan*, 786 F.2d 832, 839 n.13 (8th Cir. 1986) (stating that "a body cavity search must be conducted consistently with the *Schmerber* factors"); *Giles v. Ackerman*, 746 F.2d 614, 616 (9th Cir. 1984) (stating that *Schmerber* "implies that intrusions into the arrestee's body, including body cavity searches . . . are not authorized by arrest alone"); *see also Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997) (stating that "*Robinson* did not hold that all possible searches of an arrestee's body are automatically permissible as a search incident to arrest"); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) (stating that "*Robinson* simply did not authorize" arresting officers to conduct a strip and visual body cavity search); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1271 (7th Cir. 1983) (stating that "the *Robinson* court simply did not contemplate the significantly greater intrusions that occur[]" in a visual search of an arrestee's anal and vaginal cavities).

Several state courts have similarly concluded that the broad authority of the police to search an arrestee's person incident to arrest is limited by the principles applicable to bodily intrusions set forth in *Schmerber*. *See Commonwealth v. Gilmore*, 27 Va. App. 320, 498 S.E.2d 464, 469 (1998); *State*

with this conclusion. Body-cavity searches are different from the average full search of a person; they create natural apprehension and revulsion, and "instinctively give [courts] the most pause." *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

The State argues that, because the appellant was under lawful arrest, Rowan was authorized to search the appellant to find contraband or weapons under *United States v. Robinson*, 414 U.S. 218 (1973). The State cites *Salinas v. Breier*, 695 F.2d 1073, 1085 (7th Cir. 1982), in support of its argument that, when a person is in custody following a lawful arrest and there is probable cause to believe illegal drugs are hidden on or within the person's body, limited measures may be taken to recover the substance. Because Rowan had probable cause to believe the appellant possessed illegal drugs between his buttocks, the State argues, he was authorized to take the appellant to the fire station and retrieve the drugs.

In *Salinas*, the Seventh Circuit relied on *Robinson*, *Gustafson v. Florida*, 414 U.S. 260 (1973), and *Edwards*, which all permit a full search of one lawfully arrested. But the language in these cases should not be read to encompass body-cavity searches. The searches in these cases involved the removal of items from the clothing of the arrestees. *Edwards*, 415 U.S. at 802; *Robinson*, 414 U.S. at 222-24; *Gustafson*, 414 U.S. at 262. The searches in these cases, although extensive, were not as complete as a body-cavity search and did not have any "extreme or patently abusive characteristics." *Robinson*, 414 U.S. at 236.

Body-cavity searches have been described as "dehumanizing, demeaning, undignified, humiliating, terrifying,

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v. Milligan, 304 Ore. 659, 748 P.2d 130, 135 (Or. 1988); *People v. Williams*, 157 Ill. App. 3d 496, 510 --N.E.2d 445, 447-48 (Ill. App. Ct. 1987); *State v. Baker*, 502 A.2d 489, 492 (Me. 1985); *State v. Clark*, 65 Haw. 488, 654 P.2d 355, 361-62 (Haw. 1982); *State v. Fontenot*, 383 So. 2d 365, 367 (La. 1980).

unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (internal quotation marks omitted). These searches are highly invasive and cannot be characterized as routine. *See Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997). Even in the context of border searches, where officials need no suspicion to conduct most other searches, courts have characterized strip and body-cavity searches as non-routine searches that require various levels of suspicion to be justified. *United States v. Ramos- Saenz*, 36 F.3d 59, 61 (9th Cir. 1994); *see also United States v. Montoya De Hernandez*, 473 U.S. 531, 541 n.4 (1985) (noting that body-cavity searches are not routine border searches).

The dissenting Justice on the Court of Appeals in this case also relies on *Salinas*. *McGee*, 23 S.W.3d at 171 (Hudson, J., dissenting). The dissent found it significant that (1) Rowan had probable cause to believe the appellant was hiding drugs between his buttocks, (2) the expedient way to confirm that fact was to conduct an immediate search, and (3) Rowan tried to protect the appellant's privacy by conducting the search at a fire station. *Ibid.* The dissent explained that it did not think that the search would be any less humiliating if conducted at the jail.

It may be true that the search would not have been any less humiliating if performed at another location. But that is not the appropriate inquiry. What we must decide is whether a routine search incident to arrest permits an officer to perform a body-cavity search. Given the extraordinary and intrusive characteristics of body-cavity searches, I agree with those courts that have found that the *Robinson* line of cases and the search incident to arrest exception do not authorize body-cavity searches. *See, e.g., Swain*, 117 F.3d at 6 (and cases cited therein); *Commonwealth v. Gilmore*, 498 S.E.2d 464, 469 n.3 (Va. Ct. App. 1998) (and cases cited therein).

When a search exceeds the scope of the search incident to arrest, the warrant requirement is reinstated. *Coolidge v. New*

Hampshire, 403 U.S. 443, 484 (1971). Another exception to the warrant requirement must apply to justify a warrantless body-cavity search. We think that the exigent circumstances exception, in the appropriate case, could justify a body-cavity search after an arrest. *Cf. Montoya De Hernandez*, 473 U.S. at 541 n.4 (justifying strip searches at the border based on reasonable suspicion that suspect has drugs secreted on her person).

In *Schmerber v. California*, the Supreme Court permitted a warrantless search involving a bodily intrusion on the basis of exigent circumstances. *Schmerber*, 384 U.S. at 770-72. The case involved the removal of blood from the defendant who had been involved in a collision and arrested for driving while intoxicated. The Court found the search to be permissible because there was a clear indication that the evidence would be found, the officer reasonably could have believed that the evidence would have been destroyed had he sought a warrant, and the search was conducted in a reasonable manner. *Ibid.*

To decide whether an intrusion is reasonable under the Fourth Amendment, we weigh the particular need for the search against the invasion of personal rights. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). A reviewing court looks at the scope of the intrusion, the manner in which it was conducted, the justification for initiating the search, and the place where the search was conducted. *Ibid.*

Based on these principles, I would hold that a warrantless body-cavity search, even though conducted incident to a lawful arrest, violates the Fourth Amendment unless (1) the police have a clear indication that evidence is located within a suspect's body, (2) the police reasonably believe that the evidence would be destroyed during the delay necessary to obtain a warrant,[2] and (3) the search is

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[2] We have concluded that this is an objective, not subjective, standard in the context of an exigent circumstances review. *Colburn v. State*, 966 S.W.2d

conducted in a reasonable manner. *See Schmerber*, 384 U.S. at 770-71.

In the case before us, Officer Rowan received a tip from a concerned citizen that the appellant and two other men were selling crack cocaine. The citizen gave Rowan the names of the appellant and one other man and a detailed description of the clothing of all three. The citizen also told Rowan that the man later identified as the appellant was hiding the crack cocaine between his buttocks. Rowan was able to confirm much of the information he received in the tip. The three men matched the physical description given by the citizen. The two names provided matched the name of the appellant and one of the suspects. Evidence of drug usage and possession was found in the area. The evidence supports finding a clear indication that drugs would be found where the citizen said the drugs would be. *See Schmerber*, 384 U.S. at 770-72.

Rowan testified that, after he handcuffed the suspects, he was concerned about transporting the three men in the car together. If one suspect possessed illegal drugs and dropped those drugs in the car, it would be difficult to determine which of the three had possessed the drugs. Even Rowan testified that this was not an emergency situation. And it is standard procedure to call for back-up to transport each suspect separately, as it is standard police procedure to check the patrol car before and after a suspect has ridden in the car. Rowan did not call for back-up officers; he transported the appellant to a fire station and performed a highly intrusive search without a warrant. This record does not support a finding that there was a risk of the destruction of evidence. There was no evidence from which a reasonable officer could conclude that the drugs located between the appellant's buttocks would be destroyed during the time necessary to obtain a warrant. *See Schmerber*, 384 U.S. at 770-72.

511, 519 (Tex. Crim. App. 1998).

Because no warrant was obtained, and because no exception to the warrant requirement is supported by the record, the visual body-cavity search of the appellant at the fire station was unreasonable under the Fourth Amendment. As the Court of Appeals held, the fruits of the illegal search should have been suppressed. Because I would affirm the judgment of the Court of Appeals, I dissent.

Delivered: April 23, 2003.

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Reversed and Remanded; Motion for Rehearing Overruled; opinion of January 20, 2000; Majority and Dissenting Opinions file June 15, 2000.

IN THE FOURTEENTH COURT OF APPEALS OF TEXAS

NO. 14-98-00499-CR

DANNY JOE McGEE, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal From The 232nd District Court
Harris County, Texas
Trial Court Cause No. 771,262

MAJORITY OPINION

Panel consists of Chief Justice MURPHY and Justices ANDERSON and HUDSON.

PAUL C. MURPHY, Chief Justice.

We withdraw our opinion filed January 20, 2000, substitute the following in its place, and overrule appellant's motion for

rehearing.

In this case, we decide if evidence seized from a suspect's anal region should have been suppressed. Because we do not find sufficient information in the record to support the trial court's ruling allowing the admission of the evidence, we reverse its decision and remand this case for further proceedings.

I. FACTUAL SUMMARY

Houston Police Officer Steven Rowan was contacted one evening by a concerned citizen who told him that three men were selling crack cocaine in the area of Fleming and Cool Wood in Houston. The citizen described the clothes and appearance of the three men, told Officer Rowan the names of two of them, and stated an individual named Joe was hiding narcotics "in his ass."

With this information, Officer Rowan and his partner decided to investigate the tip. Upon their arrival at the scene, Officer Rowan and his partner found three young men, one of whom was appellant, matching the descriptions given by the citizen. These three were surrounded by a haze of blue smoke, which Officer Rowan stated he thought to be marijuana smoke. The officers approached the three men, noted that the smell of marijuana emanated from all three of them, and proceeded to obtain identification from them. Officer Rowan confirmed that the names matched the names given by the concerned citizen, and determined that two of the men were juveniles. While one of the officers checked the appellant and the two juveniles for weapons, the other officer searched the area around appellant and his friends. This officer discovered a Swisher Sweet cigar containing a small amount of marijuana. Upon this discovery, the officers handcuffed the three, loaded them into the police car, and proceeded to a fire station less than a mile away, refusing to give an explanation for this strange destination.

At the fire station, Officer Rowan obtained some sanitary

rubber gloves and proceeded to perform a visual check of the buttocks and external anal area of appellant and one of the two juveniles. During the search of appellant, Officer Rowan requested that appellant bend over a table, lower his pants and underwear, and spread his buttocks. When he refused, Officer Rowan kicked appellant's legs apart, removed appellant's clothing, and spread appellant's buttocks himself. Officer Rowan testified that a plastic covered object was in "plain view" lodged between appellant's buttocks. A field test showed this object to be crack cocaine. Officer Rowan testified that appellant was then placed under arrest and charged with possession of a controlled substance.

At the hearing on his motion to suppress, appellant related a different story from that of Officer Rowan. Appellant claimed that when the officers initially checked him for weapons, they also pulled on the waistband of appellant's pants and underclothes and looked down the front and back of appellant's pants, apparently in a search for crack cocaine. Appellant also claimed that the cocaine was not in plain view when Officer Rowan performed his search at the fire station. Rather, the cocaine was discovered after Officer Rowan probed inside appellant's anal cavity for an extended period of time. Appellant's testimony was buttressed by one of the juveniles, who testified that Officer Rowan also digitally explored his anal cavity.

The trial court overruled the motion. Appellant then pled guilty to the State's possession charges, and instituted this appeal. Appellant asserts that the trial court erred in denying his motion to suppress because the narcotics were fruits of an unconstitutional arrest and search.

II. PRELIMINARY ANALYSIS

Before we can examine the propriety of the trial court's ruling on the motion to suppress, however, we must conduct a preliminary analysis to determine whether we can reach this issue at all. *See Gonzales v. State*, 966 S.W.2d 521, 524 (Tex.

Crim.App.1998). In cases such as this one where the appellant pleads guilty after the trial court denies his motion to suppress, appellate courts must perform a two-pronged analysis. We must first identify what "fruits" the trial court refused to suppress. *See id.* (citing *McGlynn v. State*, 704 S.W.2d 15, 21 (Tex.Crim.App. 1982)). The second part of the test requires an analysis of whether or not those fruits were somehow used by the State. *See id.* (citing *Kraft v. State*, 762 S.W.2d 612, 613—14 (Tex.Crim.App.1988)). If either of these prongs is not satisfied, we cannot address the merits of appellant's claim. *See id.*

In the present case, the first prong of the test is easily determined from the record. The fruit of the search is the crack cocaine recovered from appellant's anal region.

The second part of this analysis, in contrast, is not as apparent. Nothing in the record shows that appellant based his plea on the trial court's decision to admit the cocaine. Even though this is the case, the cocaine found on appellant strongly incriminates him on the possession charge asserted by the State. Since this evidence is incriminating, we find that it has been used against appellant, giving us the right to entertain his appeal. *See Kraft*, 762 S.W.2d at 615.

Turning to the merits of the appellant's challenge to the trial court's ruling, we must set up the standard of review in cases of this nature. We review a trial court's ruling on a motion to suppress based on an abuse of discretion standard. *See Long v. State*, 823 S.W.2d 259, 277 (Tex.Crim.App.1991). At a hearing on a motion to suppress, the trial court is the sole trier of fact and judge of the witnesses' credibility and the weight to be given their testimony. *See Romero v. State*, 800 S.W.2d 539, 5.43 (Tex.Crim.App. 1990). The trial judge may choose to believe or disbelieve any or all of a witness's testimony. *See Green v. State*, 934 S.W.2d 92, 98 (Tex.Crim.App.1996). We must afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on

an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). We also afford nearly complete deference to the trial court's rulings on "mixed questions of law and fact," such as probable cause and reasonable suspicion, where the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *See id.* Further, the evidence is viewed in the light most favorable to the trial court's ruling. *See Whitten v. State*, 828 S.W.2d 817, 820 (Tex.App.-Houston [1st Dist.] 1992, pet. ref d).

III. THE WARRANTLESS ARREST CHALLENGE

We find that the trial court must have found appellant to be under arrest prior to the search for the search to be justifiable, especially since an intrusive search such as that conducted by Officer Rowan cannot be conducted on reasonable suspicion. See *Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966). Under Texas law, the point at which a person is under arrest is clear. "A person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person acting without a warrant." TEX.CODE CRIM. PROC. ANN. art. 15.22 (Vernon 1994); *see also Hawkins v. State*, 758 S.W.2d 255, 259 (Tex.Crim.App. 1988). "An arrest is complete when a person's liberty of movement is restricted or restrained." *Chambers v. State*, 866 S.W.2d 9,19 (Tex.Crim.App.1993), *cert. denied*, 511 U.S. 1100, 114 S.Ct. 1871, 128 L.Ed.2d 491 (1994). Conversely, an individual is not in custody or under arrest when he acts on the "invitation, urging or request of a police officer, and [is] not being forced, coerced or threatened." *Id.*

When a defendant seeks to suppress evidence because of an illegal arrest that violates the federal or state constitution, the defendant bears the initial burden to rebut the presumption of proper police conduct. *See Russell v. State*, 717 S.W.2d 7, 9 (Tex.Crim.App.1986); *Johnson v. State*, 834 S.W.2d 121, 122 (Tex.App.-Houston [1st Dist.] 1992, pet. ref'd). The defendant

meets this burden by proving that police seized him without a warrant. *See Russell*, 717 S.W.2d at 9. Once the defendant establishes that a warrantless search or seizure occurred, the burden shifts to the State either to produce evidence of a warrant or to prove the reasonableness of the search or seizure pursuant to one of the recognized exceptions to the warrant requirement. *See id.*

Here, the uncontroverted testimony elicited at the hearing revealed that prior to taking appellant to the fire station, Officer Rowan and his partner placed appellant in handcuffs and placed him in the back of the police vehicle. Officer Rowan testified that, at this point in appellant's detention, he was neither under arrest nor free to leave. Based on this testimony we find the only reasonable inference is that appellant was under arrest at the time the search was conducted, since his liberty of movement was restrained from the moment that he was handcuffed and placed in the police car. Further, it is clear from the record that appellant's arrest was warrantless. Since the evidence here clearly established the absence of a warrant, the burden rested upon the State to prove the existence of a valid exception.

In Texas, warrantless arrests are authorized only if (1) there is probable cause with respect to the seized individual, and (2) the arrest falls within one of the statutory exceptions delineated in the Code of Criminal Procedure. *See Stull v. State*, 772 S.W.2d 449, 451 (Tex. Crim. App. 1989). Probable cause exists "when the facts and circumstances within the officer's personal knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that, more likely than not," a particular suspect has committed a crime. *Muniz v. State*, 851 S.W.2d 238, 251 (Tex. Crim. App.1993).

We find sufficient factual information on the record to support probable cause for appellant's arrest. The concerned citizen informed Officer Rowan that appellant was in possession of and trafficking in illegal narcotics. Officer Rowan had found this informant reliable in the past. When the officers arrived on the

scene, they observed a cloud of marijuana smoke around appellant and the two juveniles, whose descriptions perfectly matched the descriptions given by the informant. Further investigation revealed that the names given by the informant matched the names of the appellant and his cohorts. The officers also found marijuana in the area around appellant and the two juveniles, although they did not witness any of them actually use the marijuana. Officer Rowan testified that, based on all of these facts, he believed it more likely than not appellant and his friends had been using narcotics just prior to his arrival on the scene. Based on the "laminated total" of these facts, we determine that the trial court did not abuse its discretion in determining Officer Rowan had probable cause to arrest appellant. *See McNairy v. State*, 835 S.W.2d 101, 106 (Tex. Crim. App. 1991) (citing *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879 (1948)).

The State also has the burden of proof to show that a statutory exception allowing warrantless arrests applies, a burden which it fails to meet in this case. On appeal, the State argues that TEX. CODE CRIM. PROC. ANN. art. 14.04 justifies appellant's warrantless arrest. This provision states:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1994). Thus, the State can utilize this exception if it shows it had "satisfactory proof" from a "credible person" that: (1) a felony had been committed; (2) the appellant was the offender; and (3) the appellant's escape was imminent. *DeJarnette v. State*, 732 S.W.2d 346, 349 (Tex. Crim. App. 1987); *Sklar v. State*, 764 S.W.2d 778, 780 (Tex. Crim. App. 1987); *Morelos v. State*, 772 S.W.2d 497, 501 (Tex. App.-Houston [14th Dist.] 1989, pet. ref'd). To utilize

this provision, the "concrete factual situation spread on the record" must justify its application. *Stanton v. State*, 743 S.W.2d 233, 235 (Tex. Crim. App. 1988). This exception is strictly construed. *DeJarnette*, 732 S.W.2d at 349. Because the State satisfied only three of the exception's four criteria at the hearing, we must remand this case to the trial court.

Here, we find the State has satisfied the "credible person" criterion of this exception. The State argues that the citizen's information is inherently credible, relying on the proposition that a concerned citizen, whose only contact with police is due to having witnessed a crime, is presumed reliable. This argument assumes the fact that the informant must be named or disclosed. *See Esco v. State*, 668 S.W.2d 358, 360-61 (Tex. Crim. App. 1982). Here, the informant's identity was not disclosed. Even though the citizen's reliability may not be presumed, Officer Rowan testified that he had relied on information provided by this concerned citizen before and had found him reliable. Though he also testified that he had not used information from this person before, if we resolve this factual dispute in favor of the trial court's denial of appellant's motion, we find a sufficient factual basis to satisfy this element of the statute.

The State also satisfied the "felony" requirement of Article 14.04. The citizen told police that appellant possessed and sold cocaine. Both of these offenses are felonies. See TEX. HEALTH & SAFETY CODE ANN. § 481.112 (Vernon Supp. 1998) (delivery of cocaine); TEX. HEALTH & SAFETY CODE ANN. § 481.115 (Vernon Supp. 1998) (possession of cocaine). Thus, Officer Rowan was informed by a credible person that a felony had been committed.

Further, the State easily satisfied the requirement that appellant was the offender. The informant told officers that the appellant was both selling and in possession of crack cocaine. In fact, the informant mentioned the appellant by name. We therefore find sufficient proof in the record to satisfy this element.

Though the State satisfied these three elements at the hearing, it failed to meet its burden in proving the "escape" criterion. As the State correctly argues:

> Article 14.04 . . . does not require a showing that the offender in fact was about to escape, nor does it require a showing that there in fact was not time to procure a warrant. The statute merely requires a showing that the officer was acting upon satisfactory proof from representations by a credible person that the felony offender is about to escape, so that there is no time to procure a warrant. *Fry v. State*, 639 S.W.2d 463, 476 (Tex. Crim. App. 1982).

This element can be satisfied by a number of factors, including temporal proximity to the commission of the crime, physical proximity to the crime scene, and the suspect's knowledge of police pursuit. *See DeJarnette*, 732 S.W.2d at 352-53. However, none of these factors is dispositive of the issue. *See id.*

This case is factually similar to two other cases decided by the Court of Criminal Appeals, *Hardison v. State*, 597 S.W.2d 355 (Tex. Crim. App. 1980) and *Pearson v. State*, 657 S.W.2d 120 (Tex. Crim. App. 1983).

In *Hardison*, an unidentified informant told police that the appellant was dealing heroin in front of a barber shop on a particular street. *See* 597 S.W.2d at 356. The informant described the appellant's clothing and stated that he stored the encapsulated heroin in his hatband. *Id.* The officer testified that he had used the informant on at least twelve prior occasions, and his information had proven reliable every time. *See id.* The officers went to the location immediately after being given the tip and observed the appellant for five to ten minutes. *See Hardison*, 597 S.W.2d at 356-57. Even though he did not commit a felony during this time, the officers approached the appellant, took his hat, and, upon finding heroin in the hatband, arrested the appellant. *See Hardison*,

597 S.W.2d at 357. The officer testified that he knew he could obtain a warrant, but gave no reason why he could not obtain one. *See id.* The court ruled this arrest invalid under art. 14.04 because there was no showing that the appellant was about to escape. *See id.* Although the test applied in *Hardison*, that there must be a showing that the suspect was about to escape, was later replaced with a lower threshold in *Fry*, see 639 S.W.2d at 476, we still find its facts a compelling analogue to this case.

In *Pearson*, an unidentified, reliable informant notified police that the appellant was at a bar and had in his possession a Tylenol box containing heroin. *See* 657 S.W.2d at 120. The informant told police that the Tylenol box was located in the appellant's vest pocket. *See id.* The police officers went to the bar, asked the appellant, who was on duty and at work in the bar, to come outside with them, and placed him under arrest. *See id.* at 121. They discovered the Tylenol box containing heroin exactly where the informant said it would be. *See id.* Looking to Hardison for guidance, the court there held the warrantless arrest invalid because there was no showing that the officers were acting upon satisfactory proof from a credible source that the appellant was about to escape. *See id.*

Here, there is also no showing that appellant was about to escape. There is no evidence that appellant had been informed of the police investigation. Appellant was found exactly where the citizen told officers he would be found. Further, when the officers approached the appellant and asked him to place his hands on the patrol car, he complied. Rather than indicating that appellant was about to escape, the facts of this case seem to indicate the contrary.

The State relies heavily on *DeJarnette* in support of its argument that the officers perceived appellant was about to escape. In that case, a bystander observed two men apparently rob another man on the street, throw him down, kick him, stab him, and then walk away. *See* 732 S.W.2d at 348. The eyewitness described the assailant to police officers. *See id.* Officers began asking people in

the area if they had observed anyone matching the assailant's description. *See id.* One person stated that he had seen someone matching that description at a bar a few blocks away. *See id.* Fifteen minutes after the crime was committed, the officers proceeded to the area around the bar, observed appellant walking away from the scene on a public street, and arrested him. *See id.* The court held this arrest valid under Article 14.04, since the totality of the circumstances supported the arresting officer's belief that appellant was attempting to escape. *See DeJarnette*, 732 S.W.2d at 353.

We find this case to be far more similar to *Hardison* and *Pearson* than *DeJarnette.* Here, there was no evidence that appellant was about to escape, either from the citizen's tip or from the officers' observations. In *DeJarnette,* the appellant had fled the scene and was seen walking away from the area where the crime was committed. Further, the facts of the case established a close proximity in time between the commission of the crime and the suspect's apprehension. Here, there is no evidence in the record to substantiate escape on the part of appellant, nor is there sufficient information from which to judge temporal proximity. Thus, we do not find *DeJarnette* dispositive of this case.

The State argues that we should infer escape since appellant was found on a public street, again relying on language in *DeJarnette*. We cannot agree. To so hold would be to eviscerate the general rule that officers obtain a warrant prior to an arrest, since every warrantless arrest in a public place would become justifiable under Article 14.04. Further, we are not inclined to believe that *DeJarnette* stands for the proposition that suspects found on public streets are inherently about to escape. Rather, we feel that the suspect's presence on a public street is yet another factor to consider when analyzing escape under Article 14.04. *See DeJarnette*, 732 S.W.2d at 353 n. 3 ("In the instant case, however, appellant was found on a public street *in the act of leaving the scene very shortly after commission of the offense.* Without considering more than the facts presented in the instant case, we

find that appellant's acts in *leaving the scene* so closely after commission of the offense are relevant to the issue of imminent escape.") (emphasis added).

Here, no evidence supporting escape was offered at the motion to suppress hearing. Because the State failed to meet its burden, we find no evidence to support the trial court's denial of appellant's motion to suppress on this issue.

Although the State failed to brief or argue the application of any other exception, we find no evidence in the record supporting warrantless arrests under TEX. CODE CRIM. PROC. ANN. arts. 14.01 and 14.03. Article 14.01 allows a peace officer to arrest an offender without a warrant for any offense committed within his presence or view. *See* TEX. CODE CRIM. PROC. ANN. art 14.01. This article has been interpreted to allow a warrantless arrest when the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing the arrested person was committing an offense. *See Stull*, 772 S.W.2d at 451. Article 14.03 allows a warrantless arrest when a suspect is found in a suspicious place and under circumstances which reasonably show that such person has committed a felony or is about to commit some offense against the law.

We find no evidence in the record to support appellant's warrantless arrest under Article 14.01. Here, the officer testified that he arrested appellant based on the informant's tip that he was in possession of crack cocaine. We cannot find that an anonymous tip that is not corroborated by the officer's observations or investigation prior to arrest will support an arrest under 14.01.[1]

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[1] Under the recent Supreme Court case, Florida v. J .L., an anonymous tip by itself will not even justify an investigative detention, even if the description of the suspect given by the informant is proven correct by the officer's investigation. *See Florida v. J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254, 2000 WL 309131 at *3 (2000).

Likewise, we find no evidence to support an arrest under 14.03. The only subsection of this article available to the State is 14.03(1) since there is no evidence in the record that appellant had committed an assault or was in violation of a protective order. There was no evidence in the record that the defendant was found in a suspicious place. Rather, he was found walking down a street with two other individuals, and the arresting officer gave no testimony that he found this particular street suspicious. Accordingly, Article 14.03 does not support appellant's warrantless arrest.

IV. HARM

Having reached this conclusion, we must now conduct a harm analysis. *See* TEX. R. APP. PROC. 44.2(a) (Vernon Pamph. 1999); *see also State v. Daugherty*, 931 S.W.2d 268, 273 (Tex. Crim. App. 1996). Factors the Court should consider in this analysis include: (1) the source of the error; (2) the nature of the error; (3) whether or to what extent it was emphasized by the State; (4) the error's probable collateral implications; (5) how much weight a juror would probably place on the error; and (6) whether declaring the error harmless would encourage the State to repeat it with impunity. *See Harris v. State*, 790 S.W.2d 568, 587 (Tex. Crim. App.1989).

An application of these factors reveals that this error was not harmless. First, the source of this error was the police officer, who on the record admitted that he felt that a strip search of appellant was justified during an investigatory stop. Second, this error was constitutional in nature, since the search deprived appellant of his right to be free from unreasonable searches and seizures under the Texas Constitution. Third, though the case did not go before a jury, it is doubtless that the State would place great

emphasis on the narcotics in its argument to the jury, since the narcotics seized from appellant are the only direct evidence possessed by the State establishing that he was in possession of a controlled substance. Fourth, the collateral consequences of the trial court's error probably resulted in appellant's guilty plea, even though the evidence used to obtain that plea might have been obtained in violation of appellant's rights. Fifth, a jury would probably place great weight on the admissibility of the evidence for the same reason it is important to the State's case-it is the only direct evidence of the crime. Finally, holding this error harmless would likely foster the continuation of this practice by police officers, especially since Officer Rowan testified that such arrests and searches were common practice. Thus, the trial court's decision should be reversed on this ground.

V. APPELLANT'S CHALLENGE TO THE CONSTITUTIONALITY OF THE SEARCH

Even assuming, however, that appellant's arrest was constitutional, he contends that the officer's search of him was unconstitutional.[2] We agree.

Appellant was arrested and taken to a fire station several minutes from the scene. Once there, the officers took appellant to a secluded area of the fire station, made appellant bend over a table, and asked him to lower his pants and underwear. When appellant refused, the officer kicked his legs apart, pulled down appellant's pants, and, using rubber gloves, spread appellant's buttocks. The officer testified that the contraband was protruding from appellant's anus. He also testified that HPD had no policy allowing this type of search at public buildings near the scene, but it was common practice among the officers working in the area where the arrests

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[2] Due to the complete absence of any Texas precedent on this issue, we believe it is appropriate to seek guidance from federal cases addressing this or similar issues.

were made to perform such searches. Moreover, the officer testified that he believed the search was necessary because if all three suspects were in the car and one of them managed to remove the contraband from his person and sequester it in the vehicle, it would be impossible to prove to whom the contraband belonged.

Though appellant argues that the officer conducted a search involving an extended intrusion into his anal cavity, if we resolve this dispute in favor of the court's judgment, we find that the officer's search is properly analyzed as a strip search or visual body cavity search. *See, e.g., Blackburn v. Snow*, 771 F.2d 556, 561 n.3 (1985) (holding that a visual inspection of the buttocks and anus of a suspect was properly analyzed as a strip search rather than a body cavity search). Though visual body cavity searches are considered intrusive, they are not as intrusive as manual body cavity searches and are judged by a lesser standard. *Compare Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966) (involving the extraction of blood) *with Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979) (involving the strip searches of prisoners). Nor has the Supreme Court or any Texas court addressed the issue of when a strip search or visual body cavity search incident to arrest may or may not be appropriate. *See, e.g., Illinois v. Lafayette*, 462 U.S. 640, 646 n. 2, 77 L. Ed. 2d 65, 103 S. Ct. 2605 (1983). Some common elements exist, however, when analyzing any search proposed to be in violation of the Fourth or Fourteenth Amendments. As the Supreme Court has noted,

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell, 441 U.S. at 559. Applying this test to the case at hand, we find the search conducted by Officer Rowan was unconstitutional and find that the contraband seized in the search should have been suppressed as the fruit of an illegal search.

Scope of the intrusion

Here, the State concedes that the search was a visual body cavity search since it involved appellant exposing his anus to the officer for his inspection. Courts have found that searches similar to the one conducted by Officer Rowan in the present case are dehumanizing, demeaning, undignified, terrifying, and embarrassing. *See Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997); *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) Due to the privacy interests involved in effecting strip searches and visual body cavity searches, there is a need for courts to give close scrutiny to them. *See 3 WAYNE R. LAFAVE, SEARCHES AND SEIZURES* 3d ed., § 5.3(c), 131 (1996).

Manner in which the search was conducted

First, the manner in which the search was conducted did little to alleviate the negative impact of the search. Appellant was taken to a fire station and, while still wearing handcuffs, was forced to lay over a table. Once appellant's buttocks were exposed, the officer admitted telling him that he wanted to "make this as painless as possible." This statement had the effect of increasing appellant's anxiety and draws further into question the manner in which the search was conducted.

Strip searches must be conducted in such a way as to protect the privacy of the person searched. *See Timberlake by Timberlake v. Benton,* 786 F. Supp. 676, 692 (M.D. Tenn. 1992). This protection is no less important in a visual body cavity search. Here the record reveals the officers also did little to safeguard appellant's privacy. The search was conducted inside an enclave of a fire station, rather than a separate room. There is no testimony the

search was protected from the view of any fire station employee or visitor who happened to pass by the area in which the search was conducted. The relevant inquiry is whether the search was conducted within the view of those in the vicinity, not whether anyone actually viewed the search. *See Logan v. Shealy*, 660 F.2d 1007, 1014 (4th Cir. 1981). Here, we do not find sufficient evidence in the record to support the conclusion that appellant's privacy interest was adequately protected.

Officer Rowan also testified that he did not believe the suspect was under arrest until after the contraband was found. This supports the conclusion that the officer believed that he had the authority to conduct a strip search of a suspect without first placing him under arrest. Though this factor is not determinative on the issue of whether appellant was actually under arrest, we find it is worth considering in our analysis of this issue.

Finally, the officer testified that searches such as this were commonplace among Houston Police officers. We find the practice of conducting strip searches and visual anal cavity searches of suspects based on little more than tips from unnamed informants clearly beyond the parameters of the Fourth Amendment.

Justification for the search

Second, the justification offered by the officers also does not seem to warrant their conduct. At the hearing, the officer stated that the search was necessary to prevent the suspects from stashing contraband in the patrol car, thus making a conviction for possession of the contraband unlikely. Though the officer's point is well taken, we believe it is worthwhile to evaluate other alternatives available to the officer in balancing this decision against appellant's privacy interests. *See United States v. Sharpe*, 470 U.S. 675, 687, 84 L. Ed. 2d 605, 105 S. Ct. 1568 (1985).

Officer Rowan and his partner had at least two alternatives which would have achieved this purpose. First, Officer Rowan and

his partner arrested appellant. The record reveals that they were not in separate cars and traveled together. B We think it a reasonable alternative that one officer could have watched the suspects while the other drove to the station. This alternative could have minimized the potential for appellant's humiliation while achieving the same purpose. Second, Officer Rowan testified that he could have called for back-up units to transport appellant and the other two suspects to the station separately, but he did not believe back-up necessary in this case. This alternative, too, would have minimized the invasion of appellant's privacy and protected the State's interest in prosecuting those in possession of contraband.

In addressing the propriety of the search, we must not address whether other alternatives were available, but "whether the police acted unreasonably in failing to recognize or pursue" the alternatives. *See Sharpe*, 470 U.S. at 675. Here, due to the ease with which these alternatives could have been effected, we find the officers were unreasonable in failing to pursue them

Where the search was conducted

As mentioned earlier, the search was conducted at a fire station near the scene of appellant's arrest. It was not conducted in a separate room, nor was it conducted at the police station, where the opportunity to better protect the privacy of appellant would have clearly been available. Again, we believe this factor weighs in favor of suppressing the contraband recovered from appellant.

VI. HARM

Based on our earlier analysis of harm in this case, we find appellant was harmed by this search.

Because we find the trial court's decision to allow the admission of the contraband seized from appellant was incorrect, we reverse its decision and remand this case for proceedings consistent with this opinion.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Majority and Dissenting Opinions filed June 15, 2000.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Reversed and Remanded; Motion for Rehearing Overruled; opinion of January 20, 2000; Majority and Dissenting Opinions file June 15, 2000.

IN THE FOURTEENTH COURT OF APPEALS OF TEXAS

NO. 14-98-00499-CR

DANNY JOE McGEE, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal From The 232nd District Court
Harris County, Texas
Trial Court Cause No. 771,262

DISSENTING OPINION

Panel consists of Chief Justice MURPHY and Justices ANDERSON and HUDSON.

DISSENT BY: J. Harvey Hudson

Because I believe the police were authorized to arrest appellant and perform a search of his person incident to that arrest,

I respectfully dissent.

The facts surrounding appellant's arrest are disputed. In such cases, we must begin our review by deferring to the lower court's determination of the historical facts. *See Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). Examining the record in the light most favorable to the trial court's ruling, it appears the police were contacted by a concerned citizen whose reliability had been established on previous occasions.[1] This person reported to police that three men were presently selling crack cocaine near the intersection of Fleming and Cool Wood. The citizen further gave the police the names of the three men, described their appearance in detail, and said appellant was hiding the cocaine "in his ass."

Recognizing from their past experience that narcotics dealers commonly hide contraband between their buttocks, the police proceeded to the intersection of Fleming and Cool Wood where they saw three men matching the description given by the citizen. The officers also noticed the men were surrounded by a cloud of "blue" smoke. The officers approached the men, confirmed their identities by name, smelled the odor of marihuana on all three suspects, and found a small quantity of marihuana in a cigar wrapper on the ground.

Thus, the police were able to corroborate several important aspects of the informant's tip by independent means; the men were (1) at the specified location, (2) at the time stated, (3) matching the description given, and (4) answering to the names provided by the informant. All that remained to be determined by the police was whether appellant had cocaine hidden in his pants. However, the

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[1] The arresting officer gave conflicting testimony regarding whether the citizen had provided him with reliable information on a previous occasion. However, at a suppression hearing, the trial judge is the sole and exclusive trier of fact and judge of the credibility of the witnesses, as well as the weight to be given their testimony. *See DuBose v. State*, 915 S.W.2d 493, 496 (Tex. Crim. App. 1996). Thus, in the absence of specific findings, we must presume the trial judge found the citizen's reliability had been previously established.

reliability of the informant's tip was made all the more convincing by several unexpected circumstances - the men were enveloped in a cloud of smoke, the police smelled the odor of marihuana, and the police found a small quantity of marihuana on the ground.[2] At this point, I think the police had abundant probable cause to believe appellant was also hiding cocaine between his buttocks. In other words, the police had probable cause to believe appellant was committing an offense in their presence.

Article 14.01

"A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view." TEX. CODE CRIM. PROC. ANN. art. 14.01 (Vernon 1977). Thus, an officer may properly arrest without a warrant where facts and circumstances within the officers' knowledge and of which he had reasonably trustworthy information are sufficient to warrant a prudent man in believing that the arrested person is committing an offense. *See Beverly v. State*, 792 S.W.2d 103, 105 (Tex. Crim. App.1990); *Magic v. State*, 878 S.W.2d 309, 312 (Tex. App.-Houston [1st Dist.] 1994, pet. ref'd); *see also Stull v. State*, 772 S.W.2d 449, 452 (Tex. Crim. App. 1989) (noting that "this Court has previously upheld arrests under Article 14.01(b) when the police officers personally observed behavior that although not

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[2] Even a cursory inspection of the case law of this state demonstrates that persons engaged in narcotics trafficking frequently possess more than one type of contraband. See, e.g., *Hernandez v. State*, 938 S.W.2d 503, 503 (Tex. App.-Waco 1997, pet. ref'd) (appellant convicted of delivering cocaine and marihuana); *Johnson v. State*, 900 S.W.2d 475, 475 (Tex. App.-Beaumont 1995), aff'd as modified, 930 S.W.2d 589 (Tex. Crim. App. 1996) (delivery of cocaine and marihuana); *Perea v. State*, 870 S.W.2d 314, 317 (Tex. App.-Tyler 1994, no pet.) (family members involved in selling marihuana and cocaine); Chavez v. State, 866 S.W.2d 62, 65 (Tex. App.-Amarillo 1993, pet. Ref'd) (appellant sold both cocaine and marihuana); *Guerra v. State*, 760 S.W.2d 681, 685 (Tex. App.-Corpus Christi 1988, pet. ref'd) (appellant was involved in distribution of cocaine, hashish, heroin, and marihuana).

overtly criminal, was, when coupled with the officers' prior knowledge, sufficient to establish probable cause that an offense was then occurring").

Here, the police had probable cause to believe the appellant and his companions were in possession of marihuana. See *Isam v. State*, 582 S.W.2d 441, 444 (Tex. Crim. App. [Panel Op.] 1979) (upholding an arrest under 14.01(b) based solely on officers smelling marijuana); *Joseph v. State*, 3 S.W.3d 627, 635 (Tex. App.-Houston (14 Dist.) 1999) (noting that "the odor of marijuana may, by itself, supply probable cause for a warrantless arrest" under § 14.01(b)); *De Jesus v. State,* 917 S.W.2d 458 (Tex. App.-Houston [14th Dist.] 1996, pet. ref'd) (holding that a narcotics dog alert on a piece of luggage was sufficient to support an arrest under 14.01(b)); *Cooper v. State*, 629 S.W.2d 69, 71 (Tex. App.-Dallas 1982) (holding that an arrest and search was permissible under 14.01(b), because the "smell of marihuana supplies probable cause for an officer to believe that an offense is being committed in his presence"), *rev'd on other grounds*, 648 S.W.2d 315 (Tex. Crim. App.1983); *see also State v. Ensley*, 976 S.W.2d 272, 275 (Tex. App.-Houston [14th Dist.] 1998, pet. ref'd) (noting that "when a police officer smells marihuana, probable cause exists to search for that marihuana"); *Jackson v. State*, 745 S.W.2d 394, 396 (Tex. App.-Houston [1st Dist.] 1987, pet. ref'd) (holding that the "smell of burning marijuana was, in itself, probable cause for the officer to make further investigation to determine whether an offense was being committed in his presence"); *Saenz v. State*, 632 S.W.2d 793, 795 (Tex. App.-Houston [14th Dist] 1982, pet. ref'd) (finding the smell of raw marijuana to be sufficient to establish probable cause to search).

Further, the presence of contraband only heightened the credibility of the informant. Thus, the officers also had probable cause to believe appellant was in possession of crack cocaine and that it was hidden between his buttocks. Under Article 14.01, it is not necessary that an officer be certain that an offense has been or is being committed, so long as he has reasonably trustworthy

information that would warrant a prudent person in believing that the arrested person has committed or is committing an offense. *Id.* Moreover, in assessing probable cause to believe an offense has been or is being committed, the officer is not restricted solely to information or facts which he has personally observed. *See Beverly v. State*, 792 S.W.2d 103, 105 (Tex. Crim. App. 1990) In addition to his own observations, an officer may rely on reasonably trustworthy information provided by another person in making the overall probable cause assessment. *Id.*; *see also Astran v. State*, 799 S.W.2d 761, 764 (Tex. Crim. App. 1990).

Accordingly, I believe the police were authorized under Article 14.01 to arrest appellant without a warrant.

Article 14.03

A peace officer may also arrest without a warrant any person found in a suspicious place or under circumstances which reasonably show that he has committed a felony or is about to commit some offense against the laws of this state. *See* TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon Supp. 2000).

In *Romero v. State*, 709 S.W.2d 53 (Tex. App.-Fort Worth 1986, no pet.), a woman told a police officer that her ex-husband had beaten her. The officer could see that the woman had a cut lip, blood in her hair, and a swollen eye. The woman described and named her assailant, said she was fearful he would return, and that he had recently been living with some friends one block away. Approximately 45 minutes to an hour later, the officer spotted a person fitting the description of the woman's ex-husband sitting on the porch of a house about a block away from the woman's residence. When the officer inquired as to his identity, the man gave the officer a fictitious name. However, in the officer's opinion, the man matched a photograph given to him by the woman. The man was arrested and found in possession of cocaine. Citing Article 14.03, the court wrote: "The former wife's obvious injuries; plus her statements recounting his assault; plus her fear

that he would do it again; plus his location only a block away; plus appellant's giving of a false name and other lies all compounded to give Endsley, the policeman, all the probable cause he needed to make an immediate arrest."

Similarly, here the police: (1) had been given a detailed report by a concerned citizen that appellant and two other named and described individuals were presently selling cocaine at a specific location; (2) knew the citizen was reliable because he had previously given police information that proved to be true and correct; (3) were told the appellant was hiding his contraband between his buttocks; (4) knew from experience that this was a common method of hiding contraband; (5) observed and confirmed all aspects of the information provided by the citizen other than possession of cocaine; (6) smelled the odor of marihuana on the appellant; and (7) found a small amount of marihuana on the ground. As in *Romero*, I believe that under Article 14.03, the police had all the probable cause they needed to make an immediate arrest.[3]

Search Incident to Arrest

The police are authorized to search all persons lawfully arrested by them. *See Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969). Thus, once a

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[3] See *Rodriguez v. State*, 775 S.W.2d 27 (Tex. App.-Houston [14th Dist.] 1989, pet. ref'd), where a Houston Police Narcotics Division officer received word from a reliable and credible confidential informant that appellant would soon arrive at a certain McDonald's restaurant driving a vehicle containing a large amount of cocaine. Approximately a dozen police officers converged on the crowded location with weapons drawn. Appellant was arrested without a warrant as he walked from the parking lot. After his arrest, appellant gave a written consent to search his vehicle and advised police that it contained five duffle bags of cocaine. On appeal, Rodriguez challenged the validity of his arrest. This Court held the record supported a finding of probable cause for a warrantless arrest of the defendant on suspicion of possession of a controlled substance. *Id.* at 31.

person has been lawfully arrested, his privacy interests must yield, for a reasonable time and to a reasonable extent, to permit the police to search for weapons, means of escape, and evidence. *See Oles v. State*, 993 S.W.2d 103, 107 (Tex. Crim. App. 1999). Whether a "strip search" is reasonable, depends upon the facts and circumstances because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. *See Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). In each case, courts are required to balance the need for the particular search against the invasion of personal rights that the search entails. *Id.* Accordingly, courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Id.*

There are few exercises of authority by the state that intrude on the citizen's privacy and dignity as severely as a "strip search." *See Mary Beth G., et al. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). However, where a person is in custody following a lawful arrest and there is probable cause to believe a controlled substance is hidden on or within the person's body, limited measures are permissible under the Fourth Amendment to recover the evidence. *See Salinas v. Breier*, 695 F.2d 1073, 1085 (7th Cir. 1982). Thus, a post-arrest search of the person may, under some circumstances, include requiring a suspect to remove his clothes and submit to a visual inspection of his person. *See United States v. Klein*, 522 F.2d 296, 300 (1st Cir. 1975).

Here, the police had probable cause to believe appellant was hiding cocaine between his buttocks. The most expedient method of confirming or refuting this proposition was to conduct an immediate search. Further, the police had not only the authority, but the duty to seize the contraband. To protect appellant's privacy, he was taken to a nearby fire station. There the police conducted a search that was focused upon and restricted to the specific area where they had probable cause to believe appellant was hiding the cocaine. While the search at the fire station was undoubtedly

humiliating, I see no evidence it would have been less humiliating had it been performed at the jail.

Under the circumstances presented here, I believe the intrusion on appellant's privacy was a reasonable search incident to a lawful arrest. Accordingly, I respectfully dissent.

/s/ J. Harvey Hudson
Justice

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

6/11/2003
COA#: 14-98-00499-CR
RE: Case No. PD-1408-00
STYLE: MCGEE, DANNY JOE

On this day, the Appellant's Motion for rehearing has been denied.[1]

Troy C. Bennett, Jr.

Kevin Howard
P. O. Box 20612
Houston, Texas 77225-0612

---

[1] The Court of Criminal Appeals of Texas did not issue a formal written order denying Petitioner's Motion for Rehearing. Instead the court mailed out a post card notice of the date the court denied Petitioner's motion for rehearing. This document contains verbatim all of the essential information that was printed on the post card. The only information not reflected in this document that appeared on the post card are the postage meter stamp which contained the date of "JUN 11'03" and "0.23" cents representing the amount of the postage.

THE JUDGE'S WRITTEN RULING ON PETITIONER'S MOTION TO SUPPRESS IN THE 232nd JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

NO. 771262

THE STATE OF TEXAS	)(	IN THE DISTRICT COURT
VS.	)(	232ND JUDICIAL DIST.
DANNY JOE MCGEE	)(	HARRIS COUNTY, TEXAS

ORDER

BE IT REMEMBERED that the foregoing Defendant's Motion to Suppress was presented to the Court on the _____ day of March, 1998.

IT IS THEREFORE ORDERED, that said Motion is hereby _____GRANTED / ___X___DENIED.[1]

DONE AND ENTERED this the 30 day of March, 1998.[2]

/S/ MARY LOU KEEL [3]
JUDGE PRESIDING

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[1] The original document contained a hand-drawn circle around the word "DENIED".

[2] The original document contained a ink stamp displaying a date of "MAR 30 1998". March 30, 1998 is the date the trial court denied Petitioner's relief requested in his Amended Motion To Suppress.

[3] On this line, the original document contained the signature of Mary Lou Keel, the trial court judge of the 232nd Judicial District Court of Harris County, Texas.

THE JUDGE'S ORAL RULING ON PETITIONER'S MOTION TO SUPPRESS IN THE 232nd JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

THE COURT: Motion's denied.[1]

[R.R., Vol. 2, page 104, line 2]

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[1] The judge of the 232nd Judicial District Court of Harris County, Texas pronounced orally in open court that she was denying Petitioner's Motion To Suppress. The Judge did not give any reasons for her decision.

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Supreme Court, U.S.
FILED
DEC 5 - 2003
OFFICE OF THE CLERK

No. 03-363

IN THE SUPREME COURT OF THE UNITED STATES

DANNY JOE MCGEE, III,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR REHEARING

Kevin Howard
Counsel of Record

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Tel.: (713) 838-0400
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Attorney For Petitioner

6 pp

CERTIFICATION OF COUNSEL

I, Kevin Bernard Howard, counsel of record for Petitioner and pursuant to Rules 44.1 and 44.2 of this Court hereby certify that the attached and foregoing Petition For Rehearing is limited and restricted to the grounds stated in Rule 44.2, and is presented in good faith and not for delay.

Respectfully submitted,

_____

Kevin Howard
Counsel of Record

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Attorney For Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether warrantless arrest of Petitioner by routine street police officer pursuant to what initially began as an investigation of an anonymous information alleging crack cocaine sales was unreasonable under the Fourth Amendment to the United States Constitution.

2. Whether warrantless strip visual or digital anal cavity search of Petitioner following warrantless arrest by routine street police officer pursuant to what initially began as an investigation of an anonymous information alleging crack cocaine sales was unreasonable under the Fourth Amendment to the United States Constitution absent exigent circumstances where the search was not conducted at a border crossing, penal institution, hospital, police station house or jail facility

PETITION FOR REHEARING

GROUNDS FOR GRANTING REHEARING

This court should reconsider and rehear Petitioner's Petition For Writ Of Certiorari for the following substantial reasons:

1. There is no Supreme Court precedence that upholds a warrantless anal cavity search of the nature performed in this case under the factual circumstances of this case as to time, place, manner and justification for the search.

2. Although the actions of Petitioner in storing contraband in his anal cavity is unquestionably despicable behavior and should not be rewarded, that fact alone should not in any way minimize the Constitutional rights guaranteed to Petitioner by the U. S. Constitution and in particular the U. S. Constitution Amend. IV.

3. By summarily denying Petitioner's petition, this Court is establishing new precedence that will be cited throughout the land as controlling authority even though the decision below is in conflict with all of the underlying Constitutional search and seizure principles consistently enunciated and applied in precedence established by this Court beginning with *Schmerber v. State of California*, 384 U.S. 757, 86 S.Ct. 1826, 1835 (1966).

4. This Court should at least state in an opinion why, in this case of an invasion of privacy to one of the most extreme degrees by means of what at a minimum is categorized as a visual anal cavity search, there is no requirement of even a cursory analysis of the warrantless search and seizure principle of exigent circumstances or why apparently there is an exception that forms the basis for the justification for the lack of the need for exigent circumstances under the facts of this case.

5. In this case, the arresting officer stated in his own words that he had made no decision to arrest Petitioner prior to the

discovery of the narcotics.

Q. Okay. So from the time you picked them up at the street to the time you get to the police station I mean to the fire station you're still doing an investigation right?
A. Yes.
Q. And what are you investigating for?
A. The street sales of crack cocaine.

[R.R. Vol. 2, page 82, lines 6-12]

Q. Okay. Is your investigation to discover sale of crack cocaine or possession of crack cocaine?
A. Actually both.

[R.R. Vol. 2, page 82, lines 18-20]

Q. Okay. So you hadn't made no decision to arrest anyone when you put them in your car correct?
A. I had made no decision to arrest or charge anyone, yes that is correct.
Q. With anything?
A. With anything at that time, yes.

[R.R. Vol. 2, page 80, lines 2-7]

Q. Now, once you found the cocaine is that when you formally put Mr. McGee under arrest?
A. Yes at that time he was placed under arrest.
Q. Prior to that time he was just an investigation and you were not arresting him?
A. It was a continuing investigation, yes.

[R.R. Vol. 2, page 85, lines 11-16]

This fact would suggest that in the officer's mine, at the time he

conducted the search of Petitioner and his juvenile companions at a public fire station, the search was not being conducted on reasonable suspicion due to security needs because Petitioner was being placed in a jail holding cell, detention center or police station, but for the sole impermissible purpose of the mere chance that contraband might be found. *Schmerber v. State of California*, 384 U.S. 757, 86 S.Ct. 1826, 1835 (1966), *Nelson v. McMullen*, 207 F.3rd 1202, 1206-1207 (10th Cir. 2000).

CONCLUSION

This is a very important search and seizure case. The facts of this goes into territory not previously addressed by this court. Additionally, the decision of the Court below is wrong.

For all of the reasons stated above, Petitioner Danny Joe McGee, III requests a rehearing and after such rehearing requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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